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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 301

ED BROWN, HENRY SHIELDS, AND YANK ELLINGTON, PETITIONERS,

vs.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

PETITION FOR CERTIORARI FILED JULY 29, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

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ED BROWN, HENRY SHIELDS, AND YANK ELLINGTON, PETITIONERS,

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STATE OF MISSISSIPPI.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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[fol. 1] [Caption omitted]

[fol. 2]

IN CIRCUIT COURT OF KEMPER COUNTY

INDICTMENT—Filed April 4, 1934

THE STATE OF MISSISSIPPI,
Kemper County:

In the Circuit Court, Kemper County at the March Term, thereof in the year of our Lord One Thousand Nine Hundred and Thirty Four.

The Grand Jury for the State of Mississippi taken from the body of good and lawful men of Kemper County, in the State of Mississippi, elected, impanneled, sworn, and charged to, inquire in and for said County, in the State aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present: That Ed Brown, Henry Shields, and Yank Ellington in said County, on or before the 4th day of April A. D. 1934 did then and there wilfully, unlawfully, feloniously and of their malace aforethought, kill and murder one Raymond Stuart, a human being, contrary to the form of the statute in such cases made and provided, against the peace and dignity of the State of Mississippi.

John C. Stennis, District Attorney.

[fol. 3] IN CIRCUIT COURT OF KEMPER COUNTY

CAPIAS AND SHERIFF'S RETURN

The State of Mississippi to the Sheriff of Kemper County—
Greeting:

We command you to take the bodies of ED Brown, Henry Shields, and Yank Ellington if to be found in your County, and them safely keep, so that you have their bodies before the Honorable, the Circuit Court of Kemper County, to be holded in and for said County, at the Court House thereof, in the Town of Dekalb, Instanter then and there to answer

unto the State of Mississippi, of a charge of Murder preferred by a bill of Indictment found and returned into said Court, at the March Term A. D. 1934, thereof, by the Grand Jury, duly empanneled and sworn at said Term.

Herein, fail not, and have then and there this writ, with the manner you have executed the same.

Given under my hand and Seal of said Court affixed, and issued the 4th day of April, 1934.

H. C. Anderson, Clerk.

I have this day executed the within writ personally on each of the within named Defendants by arresting them and bringing them into Court.

This the 4th day of April, 1934.

J. H. Adcock, Sheriff.

[fol. 4] IN CIRCUIT COURT OF KEMPER COUNTY

STATE OF MISSISSIPPI

VS.

ED BROWN, HENRY SHIELDS AND YANK ELLINGTON

ARRAIGNMENT

Comes the District Attorney who prosecutes for the State and the Defendants Ed Brown, Henry Shields and Yank Ellington in their own proper persons and represented by legal counsel, having been called to the bar and required to plead to an Indictment charging them with Murder, to which they all entered a plea of "Not Guilty".

It is therefore ordered by the Court *the* the Defendants Ed Brown, Henry Shields and Yank Ellington, be placed in the hands of the Sheriff to await further proceedings.

[fol. 5] IN CIRCUIT COURT OF KEMPER COUNTY

VERDICT OF THE JURY

"We, the Jury, find the defendant Ed Brown guilty as charged." Filed in my office this the 6th day of April, 1934.

H. C. Anderson, Clerk.

"We, the Jury, find the Defendant Henry Shields guilty as charged."

Filed in my office this the 6th day of April, 1934.

H. C. Anderson, Clerk.

"We, the Jury, find the Defendant Yank Ellington guilty as charged."

Filed in my office this the 6th day of April, 1934.

H. C. Anderson, Clerk.

[fol. 6] IN CIRCUIT COURT OF KEMPER COUNTY

SENTENCE

Comes the District Attorney who Prosecutes for the State and the defendants Ed Brown, Henry Shields and Yank Ellington in their own proper persons and represented by legal counsel, being called to the bar and required to plead to an Indictment charging them with Murder, to which Indictment they each entered pleas of not Guilty, on a former day of this Term of Court. Case having been begun on a preceeding day and not concluded. Comes the Same Jury of Good and lawful men of Kemper County Mississippi, Composed of Robert Hopper, W. G. McKinney, Auston Hicks, C. C. Hudnall, Leslie Poole, J. M. Legette, Emmett Thompson, C. A. Sinclair, B. E. Key, Marvin Burton, A. C. Hopper and E. M. Swearengin. Who after hearing all the evidence, argument of counsel, received the instructions of the Court, retired to consider their verdict, and presently returned into open Court the following Verdict to wit: "We the Jury find the Defendant Ed Brown Guilty as Charged". "We the Jury find the Defendant Henry Shields Guilty as Charged". "We the Jury find the defendant Yank Ellington Guilty as Charged". And the Court being polled as to each Jurors' Verdict, each Juror an-ounced that was his Verdict. Now comes the District Attorney who Prosecutes for the State, and the defendants Ed Brown, Henry Shields and Yank Ellington, Convicted on this day of this Term of Court of Murder. The District Attorney moves the Court to award and pronounce Sentence of the law on the said Defendants.

Ed Brown being asked by the Court if he had any thing to say as to why the sentence of the law should not be pro-

nounced upon him "Says Nothing." It is therefore ordered and adjudged by the Court that the said Ed Brown for said offence aforesaid, be and is hereby Sentenced to be [fol. 7] taken by the Sheriff of said County and in the Prison of the County at Dekalb, Miss., where he shall be confined, or in the enclosed yard of such Prison or in such Building or enclosed yard that the Board of Supervisors of said County may designate and there be hanged by the neck until he is Dead, Dead, Dead. Which execution shall be on Friday the 11th day of May A. D. 1934, said named day.

Henry Shields being asked by the Court if he had anything to say as to why the sentence of the law should not be pronounced on him. "Says Nothing." It is therefore ordered and Adjudged by the Court that the said Henry Shields for said offense aforesaid be and is hereby sentenced to be taken by the Sheriff of said County in the Prison of — County at DeKalb, Miss. Where he shall be confined, or in the enclosed yard of such Prison or in such Building or enclosed yard that the Board of Supervisors of said County may designate and there be hanged by the neck until he is Dead, Dead, Dead. Which execution shall be on Friday the 11th day of May A. D. 1934, said named day.

Yank Ellington being *saked* by the Court if he had anything to say as to why the Sentence of the Law should not be pronounced on him, "Says Nothing". It is therefore ordered and adjudged by the Court that the said Yank Ellington for said offense aforesaid, be and is hereby Sentenced to be taken by the Sheriff of said County, in the Prison of the County at DeKalb, Miss. Where he shall be confined, or in the enclosed yard of such Prison, or in such building or enclosed yard, that the Board of Supervisors of Said County may designate, and there be hanged by the neck until he is Dead, Dead, Dead. Which execution shall be on Friday the 11 day of May A. D. 1934. Said named day.

It is further ordered by the Court that the said defend- [fol. 8] ants Ed Brown Henry Shields and Yank Ellington, be remanded to Jail and there safely kept until execution day.

[fol. 9] IN CIRCUIT COURT OF KEMPER COUNTY

TRANSCRIPT OF EVIDENCE

This cause came on for hearing on a day of this Court held in and for the County of Kemper, State of Mississippi, on the 25th day of March, 1934 at 9:00 o'clock, A. M., in the Court House in the Town of DeKalb, Mississippi, before Judge J. I. Sturdivant and a Jury.

Appearances:

Hon. John C. Stennis, District Attorney, DeKalb, Miss.; Hon. Sam Graham, Meridian, Mississippi, for the State.

Hon. John A. Clark, DeKalb, Mississippi; Hon. Joe H. Daws, DeKalb, Mississippi; Hon. D. P. Davis, DeKalb, Mississippi; and Hon. L. P. Spinks, DeKalb, Mississippi, for the Defendants.

Mr. BURT STEWART, a witness for the State, after being duly sworn, testified as follows:

Direct Examination.

By Mr. Stennis:

Q. This is Mr. Burt Stewart?
A. Yes, sir.
Q. You live in Meridian, Mississippi, do you not?
A. Yes, sir.
Q. Mr. Raymond Stewart is your deceased brother?
[fol. 10] A. Yes, sir.
Q. What profession are you engaged in?
A. Architect.
Q. Are you familiar with the floor plan of the house in which it is said that your brother Raymond Stewart was killed?
A. Yes, sir.
Q. Have you made a plat or drawing representing the plan of that house?
A. Yes, sir, this is it.
Q. Is that the correct relative positions of the rooms, porches, steps and so forth?
A. Yes, sir.
Q. Did you make that drawing recently?
A. Last night.

Q. I believe that you didn't draw the rooms to dimensions?

A. No, I didn't have the size of the rooms.

Mr. Stennis: We would like to introduce this as exhibit to the testimony of Mr. Stewart. (Marked Exhibit "A".)

The Court: Is there any objection to this?

Mr. Spinks: I don't see any objection to it.

(Clerk here copy.)

(Witness dismissed.)

Mr. WILLIAM ADAMS, a witness for the State, after being duly sworn, testified as follows:

Direct examination.

By Mr. Stennis:

Q. Your name is William Adams?

A. Yes, sir.

Q. Where do you live?

A. Six miles east of Scooba in the Giles community.

Q. How far is that from the place where Mr. Raymond [fol. 11] Stewart formerly lived?

A. I think it is about 100 yards.

Q. Did you know Mr. Stewart during his life time?

A. Yes, sir.

Q. Now, Mr. Adams, on Friday of last week, state whether or not you went to Mr. Stewart's house, and if so, about what time and what you found there.

A. It was right after dinner; I had eaten, and it was somewhere between 12:00 and 1:00, or 12:00 and 1:30. On going there I had a negro with me, Ellis Giles. He came to the store and said he heard a noise over there and wanted me to investigate it. On going to the seed room, it sounded like——

Mr. Clark: We object to that.

The Court: Sustained.

Q. I asked you if you went to the house and what you found there.

A. On going to the door, I opened the door and noticed a form lying down on the flood, some human being. I

couldn't tell right at that time what it was; of course I imagined it was Mr. Raymond. It was dark in the room, and I went back into his room to get a light. I found a lantern on the mantel and lit it and brought it back and put it close to him. I first called him three or four times to see if I could rouse him, but he didn't reply. He was breathing hard and seemed to be unconscious. I found a stick there and put it in the door so he could get air and sent the boy to my father's house. In the meantion I met him about half way and told him to go for a Doctor. After I had sent for the Doctor——

Q. Wait a minute. Have you seen this plat here?

A. Yes, sir.

Q. Now, Mr. Adams, using this plat here as a guide, stand up here and indicate to the jury just where it was that you say you found Mr. Stewart's body.

A. Right in this room right here by this door, on his [fol. 12] back with his feet against the door.

Q. You said something about pushing the door open; which one was it?

A. Right there.

Q. That was where you found the body?

A. Yes, sir.

Q. Tell us what was in that room.

A. There was cotton seed and a molasses barrel right here where the door opened.

Q. What was this space out there?

A. It was a little hallway.

Q. What else did you see in that room?

A. There was a tood chest here, and it was open and a pair of trays were laying on top of the chest. All along the wall next to the door there was blood and blood was sprinkled in the tool chest. By this door going out to the back door there was bits of glass like a lamp chimney.

Q. What was it you said about a stick?

A. One was laying here somewhere. It was about five feet long and about an inch and a half thick.

Q. Was that a round stick?

A. Yes, sir; it was kind of rough.

Q. Did you see any signs on that stick?

A. I didn't notice anything on it.

Q. What door are you talking about finding it near?

A. The closet door that opened here.

Q. Which room was it that you went back to?

A. This room.

Q. What did you find in there?

A. His shoes were lying between the bed and the table.

Q. What was the condition of the bed in there?

A. It was just as if someone had been sleeping in it; it hadn't been made up.

Q. What else did you notice in there?

[fol. 13] A. I noticed nothing except the shoes on the floor.

Q. Did you notice any glasses in there?

A. They were on the table.

Q. Going back to the place where you found the body, you say that he was breathing then?

A. Yes, sir.

Q. How long did you stay there with him?

A. Until the Doctor came, I think in about 30 minutes.

Q. What had happened between the time you got there and the time the Doctor came?

A. He was breathing and knocking against the door, and before the Doctor came he ceased making any noise and ceased breathing.

Q. State whether or not he died.

A. He did. I didn't go in the room, but he evidently died.

Q. This knocking that you heard, what was that?

A. He was laying on his back with his feet against the door, and that kept the door closed. He was knocking on the door with his feet. He would slide down and knock against the door again.

Q. What about the cotton see- pile in there?

A. It was high at the back of the room and slanted down toward the door.

Q. How was he clad?

A. In his shirt and underwear; he had a blue shirt.

Q. You didn't make any examination of the body further than that?

A. No, sir.

Q. In what County and State was this house and place where you found the body?

A. Kemper County, State of Mississippi.

Q. You said something about a tool chest there; did you notice anything on the tool chest?

A. There was blood in the tool chest, and a pair of drawers was lying on it.

Q. Did you notice anything about the lock to the tool chest?

[fol. 14] A. I can't recall; I didn't notice the lock.

Q. Did you notice anything about any particular tool there?

A. A chisel was laying on the tool chest to the left hand side of it as you looked at the front of it.

Q. What kind of chisel was that?

A. It was a wood chisel, and it had a little blood smeared over it on the handle and the blade.

Q. It had a wooden handle?

A. Yes, sir.

Q. Did you stay there until Dr. Wall arrived?

A. Yes, sir. By that time a good many people were there.

Q. From the observation that you did make, what was the condition of Mr. Stewart's body and clothes?

A. From what I saw of him from the light of the lantern, blood almost completely covered his face, with cotton seed stuck on his face. His face looked like it was swollen. That was about all I noticed except there was blood on the seed and where he was laying. That is about all I noticed. I just glanced in there after I got a light. After I opened a window I just glanced in there.

Cross-examination.

By Mr. Clark:

Q. What was the name of the negro that gave the alarm?

A. Ellis Giles.

Q. He lived on your place or Mr. Stewart's place?

A. Mr. Stewart's.

Q. Is Ellis Giles here today, or do you know?

A. I don't know.

(Witness dismissed.)

Mr. Dave Owen, a witness for the State, after being duly sworn, testified as follows:

[fol. 15] Direct examination.

By Mr. Stennis:

Q. This is Mr. Dave Owen?

A. Yes, sir.

Q. Where do you live, Mr. Owen, with reference to where Mr. Raymond Stewart lived? Did you live near there?

A. Yes, sir.

Q. On last Friday, did you go to Mr. Stewarts house about mid-day or a little past?

A. Yes, sir.

Q. Did you see young William Adams there?

A. Yes, sir.

Q. Tell us what you found there?

A. When I went there, William was there, and a good many negroes was there. Just after I got there, me and my father and brother, Mr. McDade and his boy come.

Q. Did you go in the house?

A. Yes, sir.

Q. Tell us what you found there.

A. I went in the house, and there was a tool box sitting right by the door to the seed room. The door was opened kind of like this, and the tool box was open. There was blood all in it. William said that the standard was laying in the hall and ——

Mr. Clark: We object to that.

The Court: Sustained.

Q. Tell what you saw there.

A. The tool box was open, and there was blood all in it and all against the wall.

Q. The standard that you spoke of seeing, what size was it?

A. I reckon it was an inch and a half through in diameter, and 4 or 5 feet long.

Q. Were there any tools in that tool box?

A. Yes, sir.

[fol. 16] Q. Did you notice any one particular tool there?

A. Yes, sir, a chisel.

Q. What kind of chisel was that?

A. A wood chisel.

Q. What did you notice about it?

A. It had blood on it.

Q. What did you notice about this door here?

A. It was open kind of like this, and this stick was stuck in it.

Q. Did you go into this room where the stick was in the door?

A. Yes, sir.

Q. Tell us what you found there?

A. My father and brother and Mr. McDade prized the door open so I could get in. I was the smallest and I squeezed in and when I got in I found his feet against the door. I squeezed in and moved his feet so they could open the door. I moved his legs and feet. He was breathing hard then, but he died after I got in there. I was looking at him and he died right then. I reckon he was dying when I got in.

Q. How was he clad?

A. In his shirt and his underclothes.

Q. What was the condition of his face and head?

A. It was all blotted up with blood.

Q. Did you see any signs on the cotton seed or anything like that?

A. His shirt was scorched a little, and a lamp way laying over there, and the burner was a few feet from it.

Q. Where was the lamp?

A. Over against the wall.

Q. In the same room with the body?

A. Yes, sir.

Q. Where was the burner?

A. It was about four feet from the lamp.

Q. What was that you said about his shirt?

A. It was kind of scorched.

[fol. 17] Q. Where?

A. On the right shoulder.

Q. Was there any odor coming from the surroundings there? Did you smell any kind of oil there?

A. Well, I never paid any attention to that.

Q. You didn't get down and make an examination of the body?

A. No, sir. The only thing I done was to move his legs so I could open the door.

Q. What, if anything, did you notice about the tool chest besides what you have told?

A. It was open and there was blood in it.

Q. What about the keys to the chest?

A. The keys was hanging in the lock.

Q. Do you have those keys with you now?

A. I got the keys here in my pocket.

Q. Let's see them.

A. I reckon these are the keys; they are the ones you all gave to me a while ago.

Q. Show the jury how they were hanging.
A. I don't know whether it was a bunch of keys or not.

Mr. Clark: You say you don't know whether those are the keys?
A. No, sir.

Mr. Clark: Then we object to this.

Q. State whether or not it was a bunch of keys.
A. They was hanging in the lock.
Q. How many keys were hanging in the lock?
A. I never paid any attention to that.
Q. What kind of lock was that?
A. One of these silver looking locks.
Q. Did you take the keys out?
A. No, sir, I never touched them.
Q. Were you there when Dr. Wall came?
A. No, sir.

[fol. 18] Cross-examination.

By Mr. Clark:

Q. When you were talking about that standard, did you mean one of these up-right pieces that go in a hay frame?
A. Something like that; it was in the door.
Q. Was it sharpened on one end or both ends?
A. I never paid any attention to that.
Q. What kind of timber was it?
A. It looked like ash to me.
Q. Did you see any blood on it?
A. No, sir, I never did examine that close.
Q. You didn't examine the body for any wounds?
A. No, sir. I just moved his feet so I could open the door.

(Witness dismissed.)

Dr. WALL, a witness for the State, after being duly sworn, testified as follows:

Direct examination.

By Mr. Stennis:

Q. This is Dr. Wall?
A. Yes, sir.

Q. You live in Scooba?

A. Yes, sir.

Q. Are you licensed to practice medicine in the State of Mississippi?

A. Yes, sir.

Q. How long have you been practicing medicine?

A. About 25 years.

Q. Doctor, on last Friday, did you go to the home of Mr. Raymond Stewart?

A. Yes, sir.

Q. Did you make an examination there of Mr. Stewart's body?

A. Yes, sir.

[fol. 19] Q. Doctor, going somewhat into detail give the jury here the benefit of your observations and your examination of Mr. Stewart's body.

A. I was in compsny with Mr. T. H. Nicholson; he is the marshall of Scooba. We went in the back door, and in this little hallway where the killing was consum-ated there was broken pieces of a lamp chimney on the floor. The way my attention was attracted to that was that I stepped on a piece and broke it.

Q. Point out on this plat how you entered when you went in the house, please, sir.

A. We went in on these steps here.

Q. That is kind of on the side of the house?

A. Yes, sir. We went in this little hallway right here.

Q. Where was it that you observed the glass?

A. Back to the left there, and the next thing I observed was a chisel. The tool chest was open, and the trays were in it, and this chisel was laid across on top of the trays. The chisel was bloody from one end to the other. There was blood all over the tool box, but in this corner over here was a big puddle of blood. Then Mr. Nicholson and I—I don't know which went first, but he or I tried to get in the door but the door was closed and we had to push and force on it to get it open. Cottonseed was piled against the door. Mr. Stewart's feet were down against the door from the inside, and we went in this way. The body was laying something about like that. The bowl of a lamp was about a foot and a half away, and it was covered with blood. It was the bowl of the lamp they had had in the hallway. The burner was a little closer to the body. The whole wick,

the upper part and the lower part, showed that it had been on fire. I noticed that the cottonseed was scorched. Some of the gentlemen told me——

Q. Don't tell that.

A. He was dead when I got there.

Q. How long had he been dead when you arrived there? [fol. 20] A. From 15 minutes to a half hour. I got there about 1:15, and I didn't touch the body except to feel the pulse. Afterwards I examined him when he was brought out.

Q. Did you notice anything about the condition of his shirt, not with reference to blood as to whether there were any other signs on it?

A. I noticed it was burned and scorched.

Q. Whereabouts?

A. I don't know whether it was on the right or left side; it was around his chest.

Q. Did you make a complete examination of Mr. Stewart's body later?

A. Yes, sir, in connection with Dr. Cooper.

Q. Tell what your findings were; you may refer to your memorandum there.

A. Dr. Cooper made the examination, and he suggested at the time that I make a note of the findings as we went along. We found an intused bruise or wound on the right shoulder. There was an almost perfect imprint there of what looked to us like——

Mr. Clark: We object to what it looked like.

Q. Just describe the appearance of the wound.

A. It could have been done by an ordinary ax or a heavy club. It was just about that long, right in here. The collar bone was broken, and the shoulder joint was bursted all to pieces. On this arm, the bones were cracking when we went to move him. That was due to a direct blow; it may have been aimed at his head, but that is where it hit, on the right shoulder. On account of his not dying and the circulation keeping up for some hours after he was struck there was some contusion and blueness extending from that point up the side of his neck. I noted also that the skin was off his right cheek. I attributed that possibly to a burn and blister and in struggling on the cotton seed the skin over the blister might have been rubbed off. We found

a number of fractures of the skull, possibly 4 or 5, and a [fol. 21] contused wound on the head also.

Q. Tell where those were.

A. Right back of the left ear there was a wound; you might say it was a puncture there. Dr. Cooper ran both fingers down to the skull and told me to examine it also. I ran my two fingers in that place, and there was a fracture of the skull there.

Q. Indicate to the jury just where that was.

A. At just about that point. Then there were two cut wounds behind the left ear and fractures also. There was also a deep cut wound in front o- the left ear that you could run your finger in plumb down to the bone. In the top of his head the bones were beat to jelly and there were cut wounds in there you could run your finger in. When we first observed Mr. Stewart laying there, there was blood caked all over his face; you wouldn't know who he was. There was no way to identify him then..

Q. After that was partly removed, did you identify it as being the body of Mr. Stewart?

A. Yes, sir.

Q. Doctor, I believe you told us where that lamp bowl was, but you didn't tell us what was on it.

A. It was in a little cotton seed room, in there with Mr. Stewart's body. Cottonseed had been thrown in the room, and the highest part was up there and it was sloping on down toward the door. There may have been several that handled the body. It was thrown well us in there, and in struggling it eased down against the door. The bowl of the lamp was covered with blood and was laying possibly a foot and a half from his body. This burner from the lamp was possibly 7 or 8 inches or a foot from his body. We also noticed that the wick from this lamp evidently had been unscrewed and thrown in there, either on the body or close by, and it was burned all over. Both ends of the wick showed they were charred.

Q. What kind of odor was there where you found the body?

[fol. 22] A. Coal oil predominated; you could notice that perceptibly.

Q. Did you say anything about the chisel?

A. There was a chisel laying crossways on the little racks in the tool chest.

Q. Did you notice anything on it?

A. Yes, sir, it was covered with blood, the handle and blade both.

Q. Did you see anything of a stick there?

A. I saw a wagon standard, but I don't remember whether it was in the hallway or the back gallery.

Q. From your examination and opinion, did these wounds or any of them cause Mr. Stewart's death?

A. Yes, sir. Any of them except the wound on his shoulder could have caused his death.

Cross-examination.

By Mr. Clark:

Q. Doctor, who called you to the scene?

A. Mr. Luten Adams.

Q. Who was there when you arrived on the scene?

A. I remember Mr. T. H. Nicholson being there.

Q. Did he go there with you?

A. I don't think he did.

Q. Did you see young Mr. Owen there?

A. Mr. Dave Owen was there, and Mr. Will Adams, and young Mr. William Adams.

(Witness dismissed.)

Dr. I. W. Cooper, a witness for the State, after being duly sworn, testified as follows:

Direct examination.

By Mr. Graham:

Q. You are Mr. I. W. Cooper?

A. Yes, sir.

[fol. 23] Q. Doctor, did you have occasion to visit the home of Mr. Raymond Stewart on Friday of last week?

A. Yes sir.

Q. Did you have an opportunity to see and examine his body?

A. We did, yes, sir.

Q. Tell the jury, please, sir, just what condition you found Mr. Raymond Stewart's body in.

A. When we got there, we found Mr. Stewart in the cotton seed room. The cotton seed were on an incline, and

his feet was down against the door. When we got there, we determined to make fingerprints off the lamp. When they finished, we brought him out in the bed room and there Dr. Wall and I examined him. His face was all bloody and swollen. His right shoulder and his collarbone were fractured. He had two fractures of the skull where some blunt instrument drove the bone in. Back of his left ear he was cut to the bone and through the bone. He was cut on the left jaw bone, and there were numerous cuts over his head and on his face and shoulder. We searched carefully for any gun shot wounds and did not find any over his body.

Q. Doctor, did you go in the cotton seed room?

A. Yes, sir.

Q. What odor, if any, did you detect there?

A. Coal oil.

Q. Did you see any indication of the use of coal oil in there?

A. The detective had a lamp and a burner.

Q. What signs of blood, if any, did you see?

A. There was blood on the tool box and on the chisel and all around the hall where the box was.

Q. What about the wound that you examined on the head of Mr. Stewart, was it sufficient to cause his death?

A. I think any one of five wounds on him would have caused his death.

Cross-examination.

[fol. 24] By Mr. Clark:

Q. When did you arrive on the scene?

A. About 4:15 or 4:30.

Q. You drove from Meridian?

A. Yes, sir. I brought Mr. and Mrs. Stewart up.

Q. Doctor, did you say a while ago that you went for the purpose of taking finger prints?

A. No, sir. I said a detective was taking them when I got there.

Q. The body was still in the seed room?

A. Yes, sir.

Q. Dr. Wall was present there?

A. Yes, sir. When I got there, I asked if they had a physician present, and they said he was there and I went and met him and we came on in.

(Witness dismissed.)

Mr. HENRY LAVENDER, a witness for the State, after being duly sworn, testified as follows:

Direct examination.

By Mr. Stennis:

Q. This is Mr. Henry Lavender?

A. Yes, sir.

Q. You live in this County over near where Mr. Raymond Stewart did live?

A. Yes, sir, 4 miles from him.

Q. After Mr. Stewart's death, were you making an investigation or assisting in making an investigation into the cause of his death?

A. Yes, sir.

Q. Tell whether or not you went to the house of one of the Defendants here, Henry Shields?

A. Yes, sir.

Q. Don't tell what it was, but did you receive any information?

[fol. 25] A. Yes, sir. We got information there was something down there and we went to make an investigation to see what we would find.

Q. Tell what you found there.

A. We went on down there to his house. We went by Mrs. Ethridge's and asked could we make an investigation. She told us to go and if we needed to to go ahead and break in. We went to the window and shook it and it came open. We went in the house and opened the door and found a pair of shoes by the door where it looked like a bench had been pulled up there and the shoes pulled off. I spoke——

Q. Tell what you did there.

A. We went and turned up the bed and looked under the bed and couldn't find nothing. We got in the kitchen, and there was a pen built in the corner of the house about three feet high. We seen a pile of clothes in there and looked in them and down about that deep in the clothes we found a

jumper. We pulled it out and seen grey hairs on it. I said: "Don't you reckon this is hog hair"? We taken it to the light, and they said: "No, this is human." We spread it out and looked and found blood on the jumper in the front on both arms and also all over the back, and there was some slobber on the back and gray hairs. That was where they had hit him on the head, I suppose, and knocked the hair out.

Q. You observed hair of what color there?

A. Gray.

Q. State whether or not in your opinion it was human hair.

A. It was.

Q. Do you know Mr. Raymond Stewart?

A. Yes, sir.

Q. What was the color of his hair?

A. It was gray.

Q. Go ahead and tell about the jumper. Do you know the defendant Henry Shields?

[fol. 26] A. Yes, sir.

Q. This was at his house?

A. Yes, sir. That is the jumper that we found.

Q. Is this in the same condition that it was when you found it?

A. Yes, sir, only some of the blood has been rubbed off, it looks like. You can see the stain of the blood here and here and all over the sleeve here, and it looks like someone tore a place there. You could tell it was a fresh tear, and also here.

Q. Was it torn that way when you found it?

A. Yes, sir.

Q. How about these overalls?

A. I don't know anything about them. After we found this jumper I said that we had better carry this with us.

Mr. Clark: We object to that.

The Court: Sustained.

Q. Did you later make a further search of the house or premises?

A. Yes, sir. I went up there a second time; I had heard there was an ax in the house. I went and looked in the house, and it was not there. Then I went out to the wood pile and got to looking and found the ax in the wood pile

with two sticks of wood over it like that, and the handle was sticking out about that way.

Q. About how far?

A. About four inches. I picked the ax up like this and laid it on a stick of wood and looked on it and found blood. The ax looked like it had been freshly washed; you can see on top there the rust where it was freshly washed. It looks like it failed to wash off there; you can take it and see for yourself.

Q. Wait a minute. At the time you found it, state whether or not the blood on it appeared to be fresh blood.

A. Yes, sir.

Mr. Stennis: We would like to introduce this coat and ax as Exhibits to the testimony of Mr. Lavender.

The Court: All right.

[fol. 27] Q. After you had found these articles, did you have a conversation with the defendant h-re Henry Shields?

A. I haven't had any conversation with him at all.

(Witness dismissed.)

Mr. J. H. Adcock, a witness for the State, after being duly sworn, testified as follows:

Direct examination.

By Mr. Stennis:

Q. You are the Sheriff of this County?

A. Yes, sir.

Q. Do you know these defendants here?

A. Yes, sir, since I have seen them the last few days.

Q. Point out to us which is which.

A. As they sit, the one on the right is Yank Ellington, the next one is Henry Shields and the last one is Ed Brown.

Q. Did you know them before this matter came up?

A. No, sir, I never saw them that I know of.

Q. Mr. Adcock, down in the Meridian jail last Monday afternoon or night, did you have a conversation with either one of these defendants concerning the death of Mr. Raymond Stewart?

A. Yes, sir.

Mr. Spinks: We suggest that this examination be had out of the presence of the jury.

(The jury retires.)

Q. Mr. Adcock, I believe you said you had a conversation with all three defendants last Monday afternoon or night?

A. Night, I think.

Q. Now, before you talked to these boys, tell whether or not you told them who you were and what else you told them.

A. Well, I talked to them separately. I told them that I wanted them to tell me the truth about that tragedy over [fol. 28] there, that I was the Sheriff. Mr. Creekmore was present, and he was a Deputy and that all the other men were officers trying to save them from any harm or danger outside, and that was the reason that all of them were there then. I said: "Go on and tell the truth about this thing; no harm can come to you here."

Q. When you talked to them there, state whether or not you told them whether they must talk or they could leave off talking.

A. No, sir. I only insisted on them telling the truth. I told them to tell the truth and the whole truth regardless of who it might hurt or help.

Q. Did you offer them anything to tell it, or did you make any kind of promise of immunity to them?

A. No, sir. I told them that I couldn't promise them anything at all. I asked this boy Ellington how he got to Meridian, and he said they took him by Livingston, and I asked him if he knew what that was for.

Q. Did you promise him any immunity from the consequences of whatever he had done?

A. No, sir. I told them I couldn't promise them anything.

Q. Was there anything said by you or them either that they would be responsible for whatever they would say?

A. Yes, sir, I don't know at just what stage that was said, but it was said sometime during the conversation.

Q. Was there any kind of force, threats or intimidation used by you or any one there before they started to make a statement?

A. None whatever. I spoke to them separately, but I was as kind as I knew how to be.

Q. Did they make any complaint about being questioned?

A. No, sir.

Q. What expressions did they make with regard to your treatment of them?

A. They seemed to be satisfied, and one or possibly more said that we dealt very kindly with them. They said to me that I didn't even look like I was mad.

[fol. 29] Q. What did they say about feeling better after making the confessions?

A. After making the confessions or statements, and they were practically agreed on their statements, this Ellington said that he felt much better. I said: "You told the truth?" and he said: "Yes, sir." I said: "Any man does feel better when he tells the truth." One of them asked for a cigarette, and I asked Brown, "How about you: How do you feel?" and he said: " Yes, sir, I feel much better." They said: "You white folks treated us mighty nice." I said: "You made this statement freely and without threats?" and they said: "Yes." When they finally agreed on it, I said: "This is the truth?" and they said it was. I said: "Are you willing to tell this anywhere?" and they said they were. We told them that we wanted them to tell the truth. I said: "Was there anybody else in the plot?" and they said there nobody else in it. I said: "There was no other person, colored or white, in it?" and they said: "No, sir."

Q. Today have either one of these boys said anything to you about what they told you in the jail being the truth?

A. Yes, sir.

Q. What did they say to you today?

A. Two of them said to me that what they told me was exactly the truth.

Q. Which two was that?

A. Ellington and Brown.

Q. Who was present at this conversation in Meridian on Monday night?

A. Myself, Mr. Creekmore, Mr. Stevens, the Sheriff, and his brother who is a minister, Mr. Keever, Mr. Ford Vance and Mr. Parker, the jailer, Mr. McGee, Mr. Shannon and another young man called Bill.

Cross-examination.

By Mr. Clark:

Q. Mr. Adcock, did you warn each one of these boys be-
[fol. 30] fore they made any sort of admission of guilt that what they might say might be used against them?

A. I don't think that I expressed it in that sense. I said to them that I couldn't promise them anything. I told them I wanted them to tell the truth, and I said I thought they ought to tell the truth. I said: "We have tried to save you from any harm up until now, and we have got you here where we think you are safe." I asked them if they understood what the law might do to a man that did this and asked if they knew they might hang for this crime, and they said they did.

Q. Did you make that statement to them at the beginning?

A. Yes, sir, it was before we got them all together.

Q. Did you make any kind of threats against them?

A. None whatever.

Q. You didn't threaten to use any sort of force against them?

A. No, sir.

Q. Did any of the other parties present that you named a moment ago have a gun displayed there or a strap or any sort of weapon?

A. No, sir.

Q. Was Mr. Cliff Dial there when the confession was made?

A. No, sir.

Q. Did these boys or either one of them make any complaint to you before they made the confessions that they were laboring under a severe mental strain or fear?

A. No, sir, they seemed to be perfectly all right.

Q. And you say that this confession they made to you was free and voluntary on their part?

A. It had every appearance of being free and voluntary.

Q. Did they undertake to narrate what happened, or did they make answers to questions asked them?

A. Well, at first it looked like they were holding back, and they refused to make a complete statement. I told them this when they would say something; I would say:

"No, that is unreasonable and it doesn't smack with rea-
[fol. 31] son."

Q. Did that happen before they made the statement or during the course of the statement?

A. During the early part of the questioning.

Q. Did they, during that questioning, undertake to tell in their own words in a narrative form, just what happened?

A. Yes, sir.

Q. Each of them did that?

A. Yes, sir.

Q. I believe that you said in the beginning you explained to them that they might hang for it; you asked them if they knew they might hang for it?

A. I asked them if they knew the law was such if they were found guilty of that crime, if they were convicted, they would possibly hang for it, and they said they knew that.

Q. Do you know whether these boys had made a confession prior to that time, prior to making the confession to you?

A. I don't know; I had heard that.

Q. Did they make any complaint to you about that?

A. I don't think they said anything about a confession. One of the boys, Shields I believe, came in limping, and he kind of got on the box easy and looked like he was excited. I said: "Henry, sit on that box," and he said: "I can't; they strapped me pretty hard." I said: "Make yourself comfortable; nobody is going to hurt you at all. All of us are here for your protection."

Q. Did you understand that the confession that he had already made was brought about by putting him on a box and using a strap on him?

A. I didn't understand anything about how it might have happened, but he stated that he couldn't sit down.

Q. He didn't tell you whether he confessed or not on account of that?

A. No, sir, I didn't ask him anything about that.

[fol. 32] Q. You don't know whether he had confessed or not, but you had heard that he had?

A. I had heard it.

Q. But you don't know under what circumstances?

A. No, sir.

The Court: I think the confession is admissible.

Mr. Clark: We object to it, and except to the ruling of the Court.

(The jury returns.)

Examination by Mr. Stennis:

Q. Now, Mr. Adcock, you said a few minutes ago before the jury retired that these defendants made a statement to you in the Meridian jail last Monday night with reference to the death of Mr. Stewart?

A. Yes, sir.

Q. Was there any kind of threats or intimidation of these defendants at that time?

A. No, sir.

Q. Was there any kind of promise of reward or immunity held out to them?

A. No, sir.

Q. Tell who was present the best that you remember when the statements were made.

A. Mr. Creekmore, my deputy, went with me. Mr. Stevens and several of his deputies were there, Mr. Ford, Mr. Dick Keever, Mr. Parker, Mr. Shannon, and I don't know the other deputies, and Mr. McGee, the jailer, and Rev. Eugene Stevens, brother of the Sheriff.

Q. Did you talk to all of them or one at a time?

A. One at a time; Henry Shields was first.

Q. Did you talk to him by himself?

A. Yes, sir.

Q. Did you talk to the next one alone?

[fol. 33] A. Yes, sir.

Q. Which one was that?

A. Ed Brown.

Q. Then the last one you talked to was Yank Ellington?

A. Yes, sir.

Q. After that you talked to them all together?

A. Yes, sir, we brought all three together after that.

Q. Tell what, if anything, these defendants said at that time when all three were there together in the presence of these other gentlemen and yourself about their connection, if any, with Mr. Stewart's death. Take first what Brown said to you.

A. I would rather take them like I talked to them.

Q. All right.

A. Henry Shields said they met somewhere down the road on that day, which was Thursday.

Q. You are relating the conversation when all three were together?

A. Yes, sir, I would like to make this statement. I questioned them separately and then brought them together and asked for a statement, and all of them made this statement there together.

Q. That is the time that you are testifying about now?

A. Yes, sir. Henry Shields said they met that afternoon some time down the road; he didn't undertake to say just where. These boys, Ellington and Brown, told him they were going to kill Mr. Stewart for some money that he owed them for cotton checks, that he wouldn't give them the money, and they were going to have it and they wanted him to help kill him. He agreed to help them, and they were to meet about midnight down at Ed Brown's house. They did meet down there at Ed Brown's house and talked the matter over and left and went to Mr. Stewart's. Henry Shields and Ellington went directly to the west end of the house by the chimney and the door to the bedroom where Mr. Stewart was sleeping.

Q. You say that they said Ellington and Henry Shields [fol. 34] went in the residence by an entrance near the bedroom?

A. It is right by the chimney, and there is a door there and the steps come up into the bedroom. I asked them about the bed, and they said it was over in the corner of the room, and they could see his form in the bed. Ellington said that Henry hit the first lick with a stick., and Henry said Ellington hit the first lick. Each one said the other made entrance to the room first. Mr. Stewart jumper up or undertook to get up, Ellington said, after the lick with the stick; he jumped up and Shields hit him with an ax. He jumped up and said something; they never did tell exactly what he said. He undertook to go out the door into the hallway, and Shields struck a match and give it to him and told him to light a lamp.

Q. Who did that?

A. Shields. Ellington said that about Shields, and Ellington said Shields hit him with an ax and struck a match and told him to light a lamp, and he followed him on in the

hall-way, and Shields hit him again with the ax, and he run after him with the light. Mr. Stewart started out the end of the hall into another little entrance, I call it the back hall, and he met this Ed Brown. He went around the house and came in the back and was in the hall-way and had torn open a chest and had secured a foot-ax, and he said he hit him with that.

Q. Who did?

A. Ed Brown. Shields said Yank hit him with the stick again and knocked the lamp chimney off. About that time he fell against the tool chest. When Ed Brown hit him he fell. Ellington said he hit him one or possibly two licks with a chisel, a wood chisel with a wood handle about 8 inches long. I saw that chisel there myself. I asked them if they hit him any more after he fell, and they said they didn't. Shields said Ed Brown took the lamp and went in the house, and he had the keys and unlocked the safe and [fol. 35] looked in there and in the closet and all around for money, but he didn't find any money. He came back there, and Ellington and Shields put the body in the cotton seed room. The door was right at the end of the tool chest where the body fell across it. He said he got down under the man's arms and pulled him up, and his head was somewhere near——

Q. Who did that?

A. Shields did that. He said that himself, that he pulled him up and his head was right about there. He had his arms under the other man's arms, and Ellington took him by the body or legs and he pushed the door open and dumped him on the pile. Shields said Ed Brown took the lamp after he didn't find any money and poured the oil around Mr. Stewart and on him and on the cotton seed. He threw the lighted wick down there, and said he was going to burn him and the house up. Then they all left there. Brown told us—he was the next man we talked to—he told us they entered into the plot that afternoon, and that they came to his house that night and called him out and they had an understanding before they left there. They went up there, and he said two men went in the end door, and one in the side door.

Q. What purpose did he say they went for?

A. Ellington and Brown said they went to get money, and Shields said they complained about not getting their

cotton checks, and if he would go with them to get the money, they would give him $12.00 each. I asked him what he was to do up there, and he said he was to watch and hold the light, but he was to get $12.00 apiece, which would be $24.00.

Q. Go on with Brown's statement.

A. He said they all agreed sometime in the afternoon in the road to meet at Ed's house that night, and that is where they met. Around 12:00 o'clock, they rode by there; he had it all the way from 12:00 to 2:00 o'clock. He agreed that they all went there and Ellington and Shields went in the end and into the bed room, and Brown went in the back and waited with the foot ax.

[fol. 36] Q. That is what Brown said?

A. Yes, sir. He said he didn't know what happened when they got in the room, but he waited until they got out. He said Shields hit him with the ax in the big hall-way, and he was waiting there and when he came out there, he hit him with the foot-ax and he fell.

Q. That is what Brown said?

A. Yes, sir, when all of them were present.

Q. Tell us what else Brown said about it.

A. Brown said that Henry and Ellington put his body in this room, and that Henry Shields poured oil on Mr. Stewart and around him and on the cotton seed, and tried to set it on fire. They left there then.

Q. Did you ask him what he did with the foot-ax?

A. He said he tried to throw it in the well, and he thought he did. He said it was dark out there, and I asked him if the well had a top on it, and he said it didn't. There was a frame on it, but it had an open spcaer in it about two feet by three feet.

Q. Is that a well or a cistern?

A. I would call it a cistern.

Q. What, if anything, did Ed Brown say about what they did with the stick.

A. No, sir, he didn't say.

Q. Did he say anything about the lamp chimney?

A. He said it was knocked off in the scuffle somewhere there on the back porch. I asked him about that. I saw a piece of it there myself.

Q. What did Brown say that he did after he was struck there in the hall-way near the tood chest. I believe you said that Brown said Shields was the one who put the oil out?

A. Yes, sir. Brown never said anything about going in the house looking for any money, but he said Shields and Ellington carried the body in the seed room, and Shields [fol. 37] poured oil on and around him, and was going to burn it up.

Q. Brown didn't say anything about finding any money?

—. They all said they didn't find any money. I said: "You found some in his pants pocket?", and they said: "No, sir. We didn't find a thing but a penny and a pocket knife." I said: "You got a dollar or two, didn't you?", and they said: "No, he didn't have a dime." I said you threw the pants on the tool chest, and he said: Yes, sir." I said: "What did you do with the penny and the pocket knife?", and he said: "I don't know." I said: "what kind of knife was that?", and he said it was a long black handled knife. I said: "Have you ever seen that before?", and he said: "Yes, sir, I seen it at Mr. Stewart's."

Q. You had the knife there then?

A. Yes, sir. It had three blades, one long sharp blade. I said: "Do you think that you would know it now?", and he said: "Yes, sir." I pulled the knife out, and he said: "That is the knife."

Q. Where had you gotten that knife that you had there?

A. Somebody gave it to me that afternoon.

Q. At Mr. Stewart's home?

A. Yes, sir. Possible it was Mr. Howard Nicholson.

Q. What, if anything, was said about an ax by either one of the parties there?

A. Ellington and Brown said Henry Shields had the ax that evening and that night when he came up there. They said he carried it to the house and went in the room with it. Ellington said Henry hit the first lick with the ax; he first stated that he hit him with a stick, and then he said he first hit him with the ax.

Q. What did he say became of that ax?

A. He didn't know any more about it; he said Henry left there with it. Henry denied that.

Q. What, if anything, was said about a jumper with blood on it?

A. All I knew about it was that they told me——

Q. What did they say about it to you on that occasion? [fol. 38] A. I asked them, and Ed said that was his jumper and he gave it to Henry down at the house, and

Henry admitted that. Ed told him to put it on, and he did. When it was all over with, he took the jumper off and threw it down by the chimney there at the bed room.

Q. At whose house?

A. Mr. Stewart's. He told me that he had another jumper on, and Ed told him to put the old one on too. Of course, I didn't know anything about the blood stains on it.

Q. Mr. Adcock, did either one of those boys say anything about the reason for the jumper being exchanged between them, or anything like that?

A. Henry Shields said Ed Brown gave it to him and told him to put it on over his to keep off any blood stains.

Q. And they left that jumper there at Mr. Stewart's house?

A. Yes, sir, that is what he said. I asked him about it being found at his house, and he said he didn't know anything about that. I asked him about the ax, and he didn't know anything about that.

Q. What, if anything, did Henry Shields say about him entering into the agreement with the other two?

A. He agreed to do the deed for $12.00 a piece from the money that they were to get. Ellington said: "How could we pay you $12.00 when we didn't know what we was going to get. Whatever we got we was to split it." That was the way he expressed it. Henry said that he had an understanding with them that evening, and he went to Ed Brown's house that night, and he went in the room where Mr. Stewart was with Ellington, and Brown came in the back.

Q. You have taken up Henry Shields and Ed Brown now; tell what Y-nk Ellington said he had to do with it.

A. They met down the road that evening, and all agreed they was to kill Mr. Stewart for his money and get his money.

Q. How much did he say they expected to get?

A. They never did say. He said they understood he had [fol. 39] some, and they would kill him for his money. They were to meet at Brown's house that night, and they all did. My understanding from Ellington was that Henry was a little late getting there, and Ed said to him, "Henry, we had about given you out." They called Ed out and discussed it and agreed to go right on up there.

Q. Now, Mr. Adcock, what did Yank Ellington say was his part in the whole transaction?

A. Yank said he agreed with them that afternoon and went to Ed Brown's house that night. They had an understanding what each one was to do when they got up there, and he and Henry Shields went in the end door, and Henry had his ax. He said Henry hit him with a stick; I don't think he said where Henry got the stick. Mr. Stewart was in the bed, and they couldn't see him; they could just see his form, and they didn't know which way his head was. Henry hit him with a stick, and Henry lighted a match and told him to light a lamp. Henry hit him with the ax then, and Mr. Stewart jumped up. Mr. Stewart started out the door and Henry followed and hit him with the ax. He struck his first lick when he got the chisel, and hit him one or two licks with the chisel.

Q. Yank hit him with the chisel?

A. Yes, sir.

Q. What else did he say he did?

A. He helped to put him in the room there, and then after it was all over with, they left. They said they didn't know where Henry Shields went. Yank said he went home, and Ed said he went home. Henry said he went down the road and waited for the boys; he left first, and waited for them. I asked him this question: "Did they give you $12.00?" and he said: "No, sir. I was waiting for them down there, but they never did come."

Q. That was Henry who said that?

A. Yes, sir. I said: "Didn't you know that they didn't have any money?", and he said: "No, sir."

[fol. 40] Q. I didn't understand what you said Yank said about the time they were in the bed room; tell whether or not Yank hit Mr. Stewart in there.

A. No, sir. He denied it.

Q. What did Henry Shields say about that?

A. He said Yank hit him first with a stick; he said he never did hit him.

Q. What was the purpose in lighting the lamp? Did Henry Shields say about that?

A. So they could follow Mr. Stewart out. They knew the other man went in the other way to head him off, and they lighted the lamp so they could see him and followed him down the hall-way into the back hall.

Q. Henry Shields said that he was carrying the lamp?

A. Yes, sir. Ellington said he was carrying the lamp and Henry had the ax.

Q. While they were there together with you and the other gentlemen, when Ed Brown would tell about how they plotted to do this, would either one or the other two deny it?

A. They all agreed at the meeting that afternoon and the understanding was they were to meet at Ed Brown's house and go from there to Mr. Stewart's house and kill him. Shields denied that he hit a lick at all.

Q. Did Shields deny anything *esle* in connection with the crime except that he didn't hit a lick?

A. No, sir.

Q. After you talked to them there, what, if anything, did you say to them about how they felt?

A. I asked them if they had told the truth and all the truth, and they said that they had. This little boy on the end, Ellington, I believe he was smiling. He said: "Yes, sir. I feel a whole lot better." He asked one of the gentlemen there for a cigarette. I said: "Any man who tells the [fol. 41] truth feels better." I said: "What about you, Ed?", and he said: "Yes, sir, I feel a heap better." I said: "What about you, Henry?" and he wouldn't answer. The others said they had told us what licks they hit, and that Henry hit two licks with the ax.

Q. Did Henry say that?

A. No, sir, he denied hitting any at all.

Q. Did either one of them say anything about being bothered about being able to rest?

A. Ellington said: "I feel a heap better; yes, sir, I sure do. I think I can sleep good now." Ed Brown said: "I think I will too."

Q. Did Shields say anything about that?

A. He hasn't answered yet about that.

Q. Mr. Adcock, this bunch of keys that I hand you, did you see those anywhere around the premises at Mr. Stewart's home?

A. Yes, sir. On the afternoon that the investigation was being made I saw this bunch of keys, with this key sticking in the tool chest and the balance of them hanging there.

Q. What, if anything, did those boys tell you about these keys?

A. Henry Shields and Yank Ellington said that Ed Brown carried the keys for Mr. Stewart practically all the time, that he done the feeding, and that he carried these keys with him. This key was sticking in the tool chest.

Q. Did they say anything about Ed having the keys that night?

A. I don't remember about that. Yes, he said that Ed took the keys and went in the house and unlocked the safe and closet and was searching for money. He took the lamp and the keys and went in and unlocked the safe.

Mr. Stennis: We introduce these keys in evidence as Exhibit A to the testimony of Mr. Adcock. (Marked Exhibit "A".)

Cross-examination.

By Mr. Spinks:

Q. Mr. Adcock, did I understand you to say that each of these boys admitted that they went to Mr. Stewart's house that night?

[fol. 42] A. Yes, sir.

Q. Did each one of them admit that they were present when Mr. Stewart was being attacked by one or another of the three?

A. Yes, sir. All were in the house, two in one room and the other waiting at the end of the hall.

Q. For instance, when Ed Brown was undertaking to make his narration of what happened, was he interrupted and charged by either of the others of telling a falsehood on either of the others?

A. No, sir. Brown and Ellington both said that Henry had the ax, and he denied it.

Q. That is the ax they claimed he hit with, and Henry denied hitting him at all; did they give a sufficient description so that the ax was pictured on your mind?

A. Yes, sir. I asked Henry to describe the ax, and he said it was an ax with black letters on the side, and near the ax it was busted a little piece. I asked him if it had a new handle, and he said it was pretty new.

Q. Did Henry admit having the ax that night?

A. No, sir.

Q. He denied having it?

A. Yes, sir.

Q. What did he say about the ax?

A. I asked him if he had been confronted with the ax since he had been in jail, and he said he had. I asked him was this his jumper, and he said: "Yes, sir." I asked him if it was the one he had on, and he said it was. I asked him about the ax and he denied having it. He said that he left it at home.

Mr. Daws: A while ago, did I understand you to say that some one of the three told you that they had a meeting the afternoon before the killing that night?

A. Yes, sir.

Q. Which one was that?

A. All of them said they met in the road just before night.

[fol. 43] Q. How far was that from the Stewart home?

A. I don't think I ever asked that question or that they ever told me. It was down in the road somewhere about a gate or near a gate. I didn't know anything about where that was.

Q. Did they say that they had a meeting that afternoon?

A. All three of them said that. And they said that their understanding was that they would meet that night at Ed Brown's house.

(Witness dismissed.)

Mr. Bryce Stevens, a witness for the State, after being duly sworn, testified as follows:

Direct examination.

By Mr. Stennis:

Q. You are sheriff of Lauderdale County?

A. Yes, sir.

Q. Within the last few days, have you learned to know Ed Brown, this Shields boy and Yank Ellington?

A. Yes, sir.

Q. Last Monday night in the County jail in the City of Meridian, did they, in the presence of each other and of you and Mr. Adcock and some other gentlemen, make a statement about their knowledge or connection with the death of Mr. Stewart?

Mr. Spinks: We object to this as not being a free and voluntary statement.

The Court: Overruled.

A. Yes, sir.

Q. These boys were in jail there in your custody?

A. Yes, sir.

Q. Before those statements were made, what if anything did you say to them in regard to whether or not they must talk or whether or not you abused them any, or what was said to them?

A. I told them that they were in my care and keeping [fol. 44] and I was going to protect them even at the cost of my own life. I told them that I wanted any statement that they made to be free and voluntary on their part.

Q. You let them understand that they did not have to talk?

A. Yes, sir.

Q. Did they understand that what they said would be used against them?

A. That it could be, yes, sir.

Q. Were there any threats from you or anyone else? Was there any inducement of any kind to try to make them talk?

A. No, sir.

Q. Go ahead and tell the best that you remember what they said; I am talking about the conversation when all three were present.

A. Gentlemen, you can appreciate the fact that there was so much said I can only give the high spots. I can't tell it in their language. After we got all three together, this Yank began to tell it and unraveled the whole thing. He made the confession that he first hit him on the head with a stick.

Q. Was there anything said about their previous plans?

A. Yes, sir. He said they had met up together in a side road some place and planned the killing. They set this night, Thursday I believe, to commit the crime. They met again after night and went up the road to Mr. Stewart's home, and that he and this Shields went in one door and Brown went around to another door. Not being familiar with the premises, I couldn't describe it any better than that, but they went in and found Mr. Stewart asleep in bed. Then and there was where they began. One hit him with a stick and he jumped up and ran out, and one hit him as he

went out, and finally he was hit in the hall by Brown. He fell over the tool chest there. That was about this Yank's testimony.

Q. What statement, if any did he make about his actions after Mr. Stewart fell?

A. He said before he fell, as he went out, he run and hit him with the stick and with a chisel. He hit him on the side [fol. 45] of the face with the chisel. I got the idea that the chisel was about this long.

Q. What happened after Mr. Stewart was struck in the hall-way by Brown?

A. He said that he and this Shields picked him up. He and Shields picked him up by order of Brown and put him in the seed room and later Shields got the lamp and poured the oil out and set it on fire.

Q. Where did he say that he poured the oil?

A. On Mr. Stewart and the cotton seed.

Q. Do you remember Yank saying anything about what became of the lamp chimney?

A. I don't believe Yank said anything but Shields said he had been toting the lamp and the chimney was knocked off. That was his statement.

Q. Coming now to Shields, tell whether or not Shields said he agreed to the plot and what he said about it.

A. He said they planned it, and he went with them. They agreed to give him $12.00 a piece if he would go, and he claimed that he held the lamp, after this boy hit Mr. Stewart he went and got the lamp and the boy struck a match and lit it as he held it. Out in the hall, the chimney was knocked off. It went out then and he had to relight it.

Q. What reason did he give for holding the lamp there?

A. They had him to go with them; they promised him $12.00 each.

Q. Did he say whether or not he agreed to help and was helping them?

A. Yes, sir, he was helping.

Q. What was it that he said about Brown?

A. He said Brown came in a different door in the back hall.

Q. What did Shields say about a search being made of the house?

A. Yes, sir, he said after this man fell over the tool chest Brown went in the other parts of the house and made a

[fol. 46] search and came back. After they put him in the seed room, Brown searched the house.

Q. Coming to Brown, what did he say about his part?

A. He first said that he hit him with a stick in the back as he passed by, but later he opened up and said he would tell the truth. He said he hit him with a mad-ax just about the time that he got to the tool chest. He claimed then that this fellow Shields was the one that poured the oil out and set it afire.

Q. Brown said that?

A. Yes, sir.

Q. Did he expalin what they meant to do by that?

A. Burn the house and get rid of it.

Q. Do you remember what either one said about what became of this foot-ax?

A. Yes, sir. Brown said he put it in the well or made an effort to.

Q. What did they say about leaving the house after it was over?

A. Which one of them?

Q. Any of them.

A. Shields said after he helped get him in the room—he got him on his back kind of and had his hands under his arms, and this boy Yank got him by the legs. After they did that, he left. He said he left the jumper at the corner of the house on the outside at the chimney.

Q. That was Shields that said he and Yank carried Mr. Stewart's body in the seed room?

A. Yes, sir.

Q. What did he say about whether or not he was dead or alive?

A. He thought he was dead or was going to die.

Q. After this conversation with you gentlemen had been completed, what, if anything, did the defendants or either one of them say about feeling better?

A. Yank first said that. He made his statement, and he said when he got through—someone asked him if he didn't [fol. 47] fell better and he said he did feel better after he told that.

Q. What about Brown?

A. Brown said he did too.

Q. What about Shields?

A. He was a little bit sluggish all the way through. He didn't talk as free as the others.

Cross-examination.

By Mr. Daws:

Q. Did this Defendant here, Shields, ever admit striking Mr. Stewart?

A. No, sir, I don't think he did in my presence.

Q. All he told you and Mr. Adcock was that he helped put Mr. Stewart's body in the seed house?

A. And he carried the lamp.

Q. And I believe you stated that the three of them told you that they had a meeting or conference that afternoon?

A. Yes, sir, some time during the day.

Q. Was there anything said about a cotton check?

A. There was in questioning them. They didn't mention that until they were asked about it. They said there had been a check but that their part of the money had been credited to their account.

Q. Did this defendant here, Shields, say anything about a cotton check, or was it the other two?

A. The other two. I understood that Shields didn't have any connection with the cotton check.

(Witness dismissed.)

Rev. Eugene Stevens, a witness for the State, after being duly sworn, testified as follows:

Direct examination.

By Mr Stennis:

Q. You live in Meridian, Mississippi?

A. Yes, sir.

[fol. 48] Q. Have you learned to know these three defendants here?

A. Yes, sir. I just saw them one time before today.

Q. Where was that?

A. Last Monday night in the jail at Meridian.

Q. You were there in company with Mr. Adcock and your brother?

A. I went down there about 8:00 o'clock and happened to find them there.

Q. While you were there, was there a conversation between Mr. Adcock and your brother and you-self with these three defendants?

A. I heard Mr. Adcock question these boys.

Q. Go ahead and give us the benefit of what you heard them say; you might take them one at a time. Do you know them apart?

A. That is Ed Brown on the left, and this is Shields and this is Ellington.

Q. Tell us what they said about their alleged connection with the killing.

A. It would be impossible to tell just what happened throughout the examination, but I will say that he examined them separately first and then he brought them together.

Q. Were you there during all that time?

A. Yes, sir.

Q. During all the time you were there, were any threats or anything like that used against these boys?

A. There absolutely wasn't, and besides that they were told that they were there to protect them and were going to see that they had a fair trial and for them to feel easy.

Q. Were they told that they would be given any kind of immunity from what they told or did?

A. No, sir.

Q. Were their statements free and voluntary on their part?

A. I don't see why they shouldn't be.

Q. Take Ed Brown; what connection did he say he had with the plot and the killing?

[fol. 49] A. He was there and had a part in it, and he had a part in the plot. There wasn't any motive but robbery, and Ed said they all agreed if they got any spoils they would divide them equally. He went on to tell how the thing happened, but there were conflicting statements in their personal examination to that which they made together.

Q. Confine yourself to the time all three were together.

A. He stated that they all agreed to commit the crime that afternoon, and they waited until the time of night they thought the opportune time to go and commit it. He said that they all went to the house. I think he possibly said the door wasn't closed. It seemed that he was pretty familiar with the house. The two darkies, Shields and Ellington, went in a side entrance by a chimney, I think. He went

around and waited in the hall and met them there. You couldn't tell just exactly what part he performed, but he did admit that he struck him across the shoulders with a stick at some time. He admitted that he had a part in it and the other two went in a side room and came in there and struck him while he was in bed. He got up and made for this hall-way.

Q. That was Mr. Stewart that got up?

A. Yes, sir.

Q. Did Ed Brown say where he hit him?

A. That was in this examination; that was the conflicting part.

Q. Just tell what they said when all were together.

A. He finally admitted that he struck him outside near the tool chest with a foot ax— a mad-ax he called it.

Q. Talking about the time you were all there together, what did Ed Brown say was done after Mr. Stewart was struck there in the hall?

A. He said he fell across the tool chest there, and they picked him up, and I don't remember whether he said he unlocked the door where the seed were or some of the rest of them did it, and they put him in the seed room. They [fol. 50] thought that he was dead. Then I think Ed said somebody, just who I don't remember, lit a lamp and went in the house and searched the house and then came back. I would like to say this. There was so much that I couldn't remember when they were brought together, but they all agreed that all were there and worked together and had a part in it. Every one of them admitted the part that they took except Shields who stood out all the time that he didn't bring the ax and didn't hit him; the others said that he did. They all agreed except for a few details. Mr. Adcock questioned them as reasonably as he could for two hours and a half. In the main, that is all I heard, that they were the ones that did it and no one else. They were asked that question, and they said no one else was in it. They said there was no other motive except getting money.

Q. Did they say whether or not they intended to kill him when they went there?

A. I understood they went there to kill him. They went armed; they didn't deny that. Ed and this Ellington said Shields had an ax and one got a chisel; they had an ax, a mad-ax, a chisel and a stick. They said that was all they had.

Q. Now, after you had questioned these boys there, did they say anything about how they were feeling?

A. Well, when this Henry Shields said he didn't have the ax there and didn't strike him—he held out until the last on that. Brown and Ellington both told him: "You know you did, boy." He held out until the last that he didn't have the ax there, and Brown said then: "I didn't tell the truth until I come back, but now I have and I feel better." He told Shields: "Whether you tell it or not, it is going to be the same." This Ellington told him the same thing; he told him that he just as well make a full confession, but he said he didn't have the ax there and didn't strike him.

Q. Did they say anything about feeling better?

A. Two of them did. Ed Brown also asked for a cigarette [fol. 51] and some of them gave it to him.

Mr. Clark: We are making the same objection to this testimony that we did to the others.

The Court: Overruled.

(Witness dismissed.)

The States rests.

Ed Brown, one of the Defendants, after being duly sworn, testified as follows:

Direct examination.

By Mr. Clark:

Q. Your name is Ed Brown?
A. Yes, sir.
Q. Where do you live?
A. On Mr. Raymond's place.
Q. What Mr. Raymond?
A. Mr. Raymond what got killed.
Q. Mr. Raymond Stewart?
A. Yes, sir.
Q. How old are you?
A. 30 years old, going on 31.
Q. Are you married?
A. Yes, sir.
Q. How many children have you?
A. Three.

Q. How old are they?
A. One is 5, the other 10 and the other 13.
Q. Where were you raised, in Kemper County?
A. Yes, sir. Way down there about the line.
Q. Is it in Alabama or Mississippi?
A. Alabama, Sumpter County.

[fol. 52] Q. You are charged here with having participated in the killing of Mr. Stewart last Friday night or Thursday night, you and Henry Shields and Yank Ellington. Do you remember when he was killed?
A. Yes, sir.
Q. Where were you that night?
A. At home.
Q. Did you help kill him?
A. No, sir.
Q. How long had you been living with Mr. Stewart?
A. Two years, going on three this year.
Q. When did you first hear about him being dead?
A. About 1:00 o'clock.
Q. When was that?
A. Friday.
Q. On the day that he was supposed to have been killed that morning some time?
A. Yes, sir I guess so.
Q. Where were you when you heard about it?
A. I was over there coming from Dennis Cherry's.
Q. How far is that from Mr. Stewart's place?
A. Not far.
Q. Is it about a mile?
A. Just about a mile.
Q. When you heard about it, what did you do?
A. I run over there; Mr. Williams was there when I got there.
Q. Who was that?
A. Mr. William Adams; I know he was there, and there was a lot more.
Q. What did you do on the day of the killing that night?
A. I worked on the pasture.
Q. Who was with you there?
A. Me and Yank and Buddy Giles, Beth Shields and some more.
Q. Did you have anything against Mr. Stewart?
A. Not a thing at all.

[fol. 53] Q. Have you ever had any trouble with him at any time?

A. No, sir; he treated me nice, and I done the same thing.

Q. You heard Mr. Adcock and the Sheriff of Lauderdale County, Mr. Stevens, and Preacher Stevens testify about the confession you made in Meridian in the jail, saying that you participated in this killing; tell the jury whether or not you told the truth at that time.

A. No, sir I didn't tell the truth.

Q. Why did you tell something that was not true?

A. Mr. Cliff called me out of the jail Sunday evening——

Q. Who did?

A. Mr. Cliff Dial. He told me to come on out here, that he had heard I told that I killed Mr. Raymond. I come out of the jail house and I said: "I declare I didn't kill Mr. Raymond." He said: "Come on in here and pull your clothes off; I am going to get you." I said to the last that I didn't kill him. There was two more fellows about like that there, and they was whipping me. They had me benind across chairs kind of like that. I said I didn't kill him, and they said put it on him again, and they hit so hard I had to say: "Yes, sir." Mr. Cliff said: "Give it to me, and I will get it." He took it, and it had two buckles on the end. They stripped me naked and bent me over a chair, and I just had to say it; I couldn't help it.

Q. They whipped you hard there?

A. Yes, sir. I will show you. There are places all the way up there.

Q. Did you bleed any?

A. Did I bleed? I sure did.

Q. How did you tell them about the light and the lamp and such things as that?

A. They whipped me so hard, and I said I didn't know anything about them, and they put me down the third trip and said: "Ain't that so?" He said: "What about the [fol. 54] lamp"?, and I said: "I reckon Henry Shields done that." They said: "You know more than that." They put me down again, and they whipped me so bad I couldn't sleep that night.

Q. When did this whipping take place?

A. Sunday evening. They whipped that boy first, and then they told me to come on out.

Q. When Mr. Adcock and Mr. Stevens and his brother and some other gentlemen were talking to you on Monday night, did they threaten you on that night?

A. No, sir. I was scared because Mr. Cliff said I had better tell it like I told him. I was scared.

Q. When did he tell you that?

A. When he was whipping me, and after I got up.

Q. He told you what?

A. That I had better not get off what I had told him.

Q. That is the reason you told Mr. Adcock what you did?

A. Yes, sir, that is the reason. If you all could see the places, you would say a train didn't move any lighter.

Q. You told these gentlemen what you told Mr. Cliff on Sunday w*eh*n he was whipping you?

A. Yes, sir.

Q. You tell the jury and Court that is the reason that you told it because of what Mr. Cliff Dial said to you?

A. Yes, sir.

Q. Were you telling the truth then?

A. I am telling the truth.

Q. I mean when you told Mr. Adcock and Mr. Stevens; was that the truth or a lie?

A. I was telling a story, because Mr. Cliff said I had better tell it like I told him Sunday evening.

Q. Where did you go on that Thursday night, if anywhere?

A. Me and my wife just about sundown, it was getting dusk dark, and we met Mr. Stewart just below the barn. [fol. 55] He said: "Ed, I started down to your house after my gun." I said: "What is the matter now?" and he said: "I heard——

Mr. Stennis: We object to that.

The Court: Sustained.

Q. What did Mr. Stewart do there then?

A. I handed him the gun.

Q. What did he do?

A. He took the gun and went back to the house, and me and my old lady went to Fanny Livingston's.

Q. How long did you stay there?

A. I never looked at the clock; we come home about 9.30 or 10.00.

Q. What did you do then?

A. We roasted sweet potatoes and eat them, and me and her went to bed then.

Q. Did you stay there?

A. Yes, sir, until the lady cooked breakfast; the ground was too wer to get out.

Q. Did you generally go to Mr. Stewart's house in the morning?

A. The ground was too wet that day. I didn't go unless it was to get the mules. He had told us not to plow no more land like we did last year, to wait until it got dry.

Q. Did anybody else come in your house that night?

A. Didn't nobody come in.

Q. When were you arrested on this charge?

A. That same day.

Q. Who arrested you?

A. Mr. Cliff was there.

Q. You were there at the house?

A. Yes, sir.

Q. You helped them look around there?

A. Yes, sir.

Q. You tell the jury and the court that the reason you told what you did was because you were afraid of Mr. Cliff [fol. 56] Dial and the other people who whipped you on Sunday?

A. Yes, sir, that is how come I told it. They put me down three times. Two times I said: "No, sir." Until the last time, I said, "I ain't never harmed Mr. Stewart in my life." They said: "Get down again." He took the strop away from the little fellow and it looked like he was going to kill me, and I said: "Yes, sir." He said: "What about the lamp?" I said: "I don't know." He said: "Put him down again.", and I said: "Yes, sir." He was whipping me so hard I had to say "yes, sir."

Cross-examination.

By Mr. Stennis:

Q. You heard Mr. Adcock's testimony?

A. Yes, sir.

Q. You heard about what the other two men said you told them?

A. Yes, sir.

Q. They told it right, didn't they?

A. I told it because Mr. Dial had done beat me so.

Q. I k*own* that; I know you say that is why, but you did tell them just what they said?

A. Yes, sir. After he got through beating me, he told me I better say what I said to him.

Q. But it is true that you told Mr. Adcock and these other gentlemen on Monday night just what they said you to*dl* them?

A. Are you talking about when this man got through whipping me?

Q. No. On Monday night when Mr. Adcock and the two gentlemen*t* who were on the stand were there, you told them just what Mr. Adcock told here on the stand?

A. Yes, sir. I told them because I was scared.

Q. Mr. Adcock told a while ago just exactly what you told him in the jail there?

A. Yes, sir. The reason I did tell it was because Mr. Cliff had beat me so.

Q. And after you got through, you told Mr. Adcock that you felt better?

[fol. 57] A. Yes, sir, but a man will say anything when he is beat up like that.

Q. When Mr. Adcock first talked to you that night, you didn't tell him all about it?

A. No, sir.

Q. He said a while ago that when he talked to you alone that night you wouldn't tell it all, but when all three were together you told it every bit?

A. Mr. Cliff told me I better tell it.

Q. When you first talked to Mr. Adcock, you didn't tell it all?

A. Yes, sir, I told him all I knowed.

Q. And when he got all three of you together, you told it all then?

A. All I knowed then.

Q. You knew what you were talking about, didn't you?

A. No, sir.

Q. You just said that you told all you knew about it.

A. I was scared because Mr. Cliff had beat me so.

Q. How did you know what to tell Mr. Adcock?

A. Because he told me I had better tell him the truth.

Q. And that was what you were telling him?

A. I said that because Mr. Cliff Dial said I had better tell that thing all the same way I told him.

Q. And Mr. Adcock told you you had better tell the truth?

A. Yes, sir.

Q. And you told him the truth?

A. I told it like I said just now.

Q. What you told him was the truth?

A. I had to tell it because I was afraid.

Q. Monday night down in the jail, when the other two boys were not there, you didn't tell all of it then?

Mr. Clark: We object. He was just examined on the time when all three were present.

[fol. 58] Mr. Stennis: There was something said about the first examination. You have gone into the previous examination.

The Court: Overruled.

Q. When you first talked to Mr. Adcock in the jail Monday night before they brought the other boys in there, you didn't tell him all of it?

A. Yes, sir.

Q. You told him all you knew about it then?

A. Yes, sir.

Q. Everything you could remember about what happened, you told him?

A. Yes, sir.

Q. You told it the best that you could remember?

A. Yes, sir.

Q. Everything about the lamp chimney—you told that?

A. Yes, sir, the way they told me to tell it.

Q. You told him the*y* way you went in the side door?

A. He made me tell all that.

Q. Who did?

A. Mr. Cliff, when he was whipping me.

Q. Did Mr. Cliff make you say that you had a foot-ax?

A. He said: "What did you hit him with?", and I said: "Nothing." He said: "What did you hit him with, or I will beat you to death." I said: "A stick." He said: "No", and I said: "A foot ax."

Q. The night that Mr. Adcock was there, Mr. Dial wasn't there?

A. No, sir.

Q. You hadn't seen him any more after he whipped you?

A. Yes, sir, but I don't reckon he seen me.

Q. When I read that paper to you yesterday, you said that you killed him, didn't you?

A. Yes, sir, but that was on account of that man.

Q. Didn't you see Mr. Adcock this morning and tell him what you told in the jail the other night was the truth?

[fol. 59] A. I done that because Mr. Cliff said he would beat me, and I was scared.

Q. Aren't you still scared of Mr. Cliff?

A. Yes, sir, but I am going to tell the truth; I ain't never harmed him.

Q. That is what you told Mr. Adcock down there in the jail—that you were going to tell the truth?

A. Yes, sir, after he scared me; after Mr. Cliff scared me.

Q. And that is what you were telling him when you told how it happened?

A. No, sir. What I told them, he just made me do it. The jailer come up there and said: "Did you deny it?", and I said: "No." He said if I had they would have got on me again.

Q. The only thing that Mr. Cliff told you was that you had to tell what part you took in it?

A. He told me I had to tell on Shields. He said Henry said that I was there.

Q. What else did he tell you?

A. That's all.

Q. He didn't tell you to tell on anybody else, did he?

A. Yes, sir, he told me Henry Shields had told it.

Q. He didn't tell you to tell on anybody except Henry, did he?

A. No, sir.

Q. And then you told Mr. Adcock that Yank had a part in it?

A. Yes, sir, but he had done told it on me.

Q. What reason do you give for telling Mr. Adcock that Yank had a part in it?

A. No, sir, I didn't see Yank at all. I ain't saw him at all since me and him was working together.

Q. Why did you tell Mr. Adcock that Yank was there?

A. I was just scared.

Q. Why did you pick Yank?

A. I was just scared.

[fol. 60] Q. You didn't see Yank there?

A. Not until 1:00 o'clock that Friday.

Q. Friday?

A. No, sir, it was Thursday.

Q. Were you and Yank working together that Thursday?
A- No, sir, he was on the pasture and I was on the gate.
Q. Where was Shields working that day?
A. I don't know.
Q. Was he working on the fence there?
A. No, sir. Somebody said he was cutting wood.
Q. Did you see Henry Shields on Thursday?
A. No, sir.
Q. You didn't see him that night anywehre?
A. No, sir, because I didn't get out of the house.
Q. Mr. Adcock treated you nice that night down in the jail?
A. Yes, sir.
Q. He told you he was going to protect you and do everything he could for you?
A. Yes, sir.
Q. And he told you that he wanted you to tell the truth?
A. Yes, sir.
Q. He told you that you didn't have to tell anything?
A. Yes, sir.
Q. You went right on then and told them what they say you told them?
A. Yes, sir, but I told that because I was scared.
Q. You knew when you were telling that, you were telling the truth?
A. No, sir, I was telling a lie, boss, if you will *m*ardon me saying that.
Q. They didn't do anything to you that night, did they?
A. I had to say it because the man*d* had done beat me so I was scared. I ain't never harmed Mr. Stewart in my life.
Q. There were not any fellows present on Sunday night that were there on Monday night?
[fol. 61] A. I don't know.
Q. Mr. Adcock and the others told you that you didn't have anything to fear from them?
A. Yes, sir, but I was just scared. I am scared every night I have been here.
Q. They told you that they were going to protect you?
A. Yes, sir, but I was scared.
Q. Why did you plead guilty here in open court yesterday?

A. I was scared and didn't know no better.

Q. The Court appointed lawyers for you yesterday afternoon?

A. Yes, sir but I told him I didn't need none.

Q. You told the Court you didn't think they would do any good?

A. I told him I didn't think they would do no good because the man whipped us and told us we better stand on what we said.

Q. You talked to your lawyers yesterday afternoon?

A. In that room there, yes, sir.

Q. You talked to them again this morning?

A. Yes, sir.

Q. After you talked to them this morning you told Mr. Adcock that all that you told him in jail on Monday was so?

A. What I told him this morning, I didn't know what I was doing then.

Q. Do you know what you are doing now?

A. Sir?

Q. Do you know now?

A. I don't know, but I will die on this, boss, I ain't never harmed Mr. Raymond.

Q. After you talked to them yesterday afternoon and this morning, you told Mr. Adcock here today that what you told him in the jail in Meridian was so?

A. I was just scared.

Q. Did you tell him that was true?

A. Yes, sir.

[fol. 62] Q. Now, explain why you did that.

A. It was right up where those beds are at, wasn't it, Mr. Adcock?

Q. It was up-stairs here?

A. Yes, sir.

Q. Who else was there at that time?

A. I don't know the man.

Q. Mr. Adcock hadn't ever done anything to you?

A. No, sir.

Q. One of these boys here told Mr. Adcock the same thing this afternoon, didn't he?

Mr. Clark: We object to that.

The Court: Sustained.

Q. You were not afraid of Mr. Adcock when you were up here?

A. No, sir, I wasn't scared but let me tell you this. You know white people pull together and negroes won't. I didn't know what Mr. Adcock would do, but I am going to die on the truth—I did not harm Mr. Raymond.

Q. You were not saying that a few hours ago, were you?

A. The man whipped me *do* I had to say it. I ain't never harmed Mr. Raymond. There ain't no need of saying I done it when I didn't.

Q. You told Mr. Adcock that you did do it?

A. Yes, sir.

Q. And now you say you didn't?

A. If I die right now, I am going to say it: I ain't never harmed Mr. Raymond in my life. If they want to they can kill me because I said that, but I ain't never harmed Mr. Raymond in my life.

Q. When you talked to Mr. Adcock up here this morning, you said that you had denied it this morning because your wife was present?

A. Yes, sir.

Q. Didn't you tell him that you denied it this morning because your wife was present and you didn't want to admit it before her?

A. I am not disputing his word. I spoke like this to Mr. [fol. 63] Adcock: "I am going to tell the truth or die——"

Q. Just answer my question.

A. I said: "Nothing I can do is going to help now, I don't reckon." I just said that; ain't that the way I said it, Mr. Adcock? I just said it because my old lady said it like that.

Q. You immediately told him that what you said in Meridian was the truth?

A. No, sir, it wasn't the truth.

Q. But you told Mr. Adcock that it was?

A. Yes, sir, but I ain't never harmed Mr. Adcock in my life.

Q. You say that you didn't go to Mr. Stewart's house in the morning unless it was dry?

A. No, sir.

Q. Did it rain that day?

A. It rained that week.

Q. About what time did you get through with the fence that Thursday?

A. I don't know.

Q. Was it before sun down?

A. Yes, sir.

Q. Does this boy Shields live where you do?

A. He lives on the other side.

Q. About how far from you?

A. About a mile or a little better.

Q. Where did Yank live?

A. About a good mile from his house and about a mile and a half from mine.

Q. You quit work that afternoon a little while before sun-down?

A. Yes, sir. I carried the wagon and mules to the house and sent the mules off by a boy.

Q. Whose ax is that?

A. Shields' ax.

Q. It has a split handle close to the ax part?

A. Yes, sir.

[fol. 64] Q. And it has black marks on the handle?

A. Yes, sir.

Q. When was the last time that you had these keys?

A. He didn't let nobody tote them.

Q. How do you know whose keys they are?

A. I have seen Mr. Raymond with them.

Q. Which one of these keys fits the tool chest?

A. I don't know; I ain't never been in it in my life.

Q. Which one fits the safe?

A. I don't know.

Q. We want to get in the safe.

A. I don't know, boss.

Q. What kind of knife did Mr. Raymond have?

A. He used to tote one with three blades in it.

Q. Mr. Adcock showed you that knife?

Q. Yes, sir, I told him I knowed it.

Q. You told him about the knife and a penny?

A. No, sir. I didn't tell that. He misunderstood me on that. I saw Mr. Raymond with the knife lots of times, but I didn't see him that day up at the house with it.

Q. Who was it that told the officers, Mr. Adcock and the others, that there wasn't anything in Mr. Raymond's pocket but a knife and a penny?

A. That's what I said—that's what they all said, but I hadn't been in there.

Q. Then how did you know what was in there.

A. That's what the boys said.

Q. Who was the first one that spoke about that?
A. One of them spoke about it.
Q. One of these boys here?
A. No, sir, some of the other boys in there.
Q. Do you mean colored boys or officers?
A. Some colored men there at the house.
[fol. 65] Q. When did you hear that?
A. That day.
Q. Before they arrested you?
A. Yes, sir.
Q. They arrested you not long after they found the body?
A. Yes, sir. I come up there and in about 15 minutes or 20 minutes Mr. Cliff throwed a pump gun on me.
Q. Was that at the house?
A. Yes, sir, I was out from the house a piece.
Q. Back to this Monday night, Mr. Adcock didn't threaten you, did he.
A. No, sir, but I was scared all right.
Q. He told you that you didn't have to talk?
A. Yes, sir, but I knowed what the jailer said; he said they would whip me again.
Q. You told those gentlemen the best you could just how it happened.
A. I had to. I haven't had my hands on Mr. Raymond.
Q. Tell us again why you told Mr. Adcock up here today that it was the truth what you said in Meridian.
A. I told him just like this. My wife said something or other about it won't do any good no how. After that, I said I didn't kill him. I thought I just as well go ahead and tell the truth, because I will die any way. I didn't kill Mr. Raymond, and I didn't help kill him.
Q. Mr. Stewart's shot gun was down at your house?
A. Yes, sir, he let me keep it all the time.
Q. What kind of gun is that?
A. L. C. Smith.
Q. How long have you had it?
A. About 2 years.
Q. You have been keeping it all that time?
A. Yes, sir, he told me to hunt with it.
Q. Who furnished the shells for it?
[fol. 66] A. I furnished them. He would give me shells some times to kill squirrels with for him.
Q. You also kept Mr. Stewart's pistol?

A. Yes, sir, but I hadn't had it long, about a month after somebody stole his 32 Special.

Q. You told Mr. Adcock that you had had it about two months.

A. Yes, sir.

Q. That left Mr. Stewart without a weapon at all?

A. I told him he could get it when he got ready.

Q. Now, about dinner time when Mr. Adcock carried you up here where the beds are, didn't you tell him that you wanted to speak to him for a minute?

A. Yes, sir, I spoke to him.

Q. Didn't you tell him there then that you had said this morning in the presence of your wife that you were not guilty, but you said that was because your wife was there and she had said that you were at home?

A. Yes, sir, I was at home.

Q. Didn't you tell Mr. Adcock up here where the beds are after you had called him off?

A. Me and that boy was there.

Q. Didn't you tell him that at about dinner time?

A. Yes, sir.

Q. You told him this, that this morning you had said you didn't have anything to do with it, that you were at home.

A. Yes, sir, I was at home.

Q. But that the reason you said that was that your wives were there and they said that, and that you were going to agree with them, but that the truth was what you had told in the Meridian jail?

A. No, sir. I told him that tale because the man had beat me so.

Q. You told Mr. Adcock in the dormitory up here that you had told him the truth in Meridian?

[fol. 67] A. I told him because the man beat me so.

Q. Why did you call Mr. Adcock off and tell him this additional tale?

A. Because I was scared I was going to get another beating.

Q. You didn't get one yesterday?

A. No, sir.

Q. The court gave you two lawyers yesterday?

A. Yes, sir.

Q. And two more this morning?

A. Yes, sir.

Q. That makes four?
A. Yes, sir.
Q. And you still called Mr. Adcock off and told him what you said in Meridian because you were scared was true?
A. Yes, sir. I will die on that, boss; I didn't touch Mr. Raymond.
Q. You say that you are afraid of Mr. Dial?
A. Yes, sir.
Q. Which do you think would be the worse, to have Mr. Dial there and be afraid of him or confess killing Mr. Stewart?
A. I didn't kill Mr. Stewart.
Q. You knew that you were confessing to killing him?
A. No, sir.
Q. You knew what it meant when you said you helped kill him?
A. I was telling a tale when I spoke that.
Q. Didn't you know it would hang you when you told that you killed him?
A. Yes, sir.
Q. But you went on and told that Monday night?
A. Yes, sir, I was scared because he beat me so.
Q. And you told it again today?
A. I was still scared.
Q. Are you scared now?
A. Yes, sir.

[fol. 68] Redirect examination.

By Mr. Clark:

Q. You say the jailer in Meridian told you the man would get you again?
A. Yes, sir. The boy that works there come up there, and I told him I didn't touch the man, and I would die on that.
Q. Mr. McGee, the jailer, told you they would get you again if you denied it?
A. Yes, sir, he brought the boy up there to see if I denied it.
Q. Where was Mr. McGee when they whipped you that Sunday afternoon?
A. I didn't see him to know him when they whipped me.
Q. Where did they have you?
A. In that room where they have all those guns setting up there.

Q. Who was in there?

A. Mr. Burt.

Q. Who?

A. Mr. Guy Jack and a little fellow; his home is out of Scooba. I know him when I see him, and Mr. Buddy Gilbert was there, Dr. Gilbert's some. The other two men, I don't know them.

Q. The sheriff wasn't there, and Mr. Adcock wasn't there?

A. I didn't see Mr. Adcock; the way they was hitting, I wouldn't have knowed him.

Q. The gentlemen that testified here, the Sheriff of Lauderdale County, wasn't there?

A. I don't know, boss.

(Witness dismissed.)

HENRY SHIELDS, a defendant, after being duly sworn, testified as follows:

Direct examination.

By Mr. Daws:

Q. How old are you?

A. 27.

[fol. 69] Q. Are you married?

A. Yes, sir.

Q. Where were you raised?

A. I was raised at Mr. Howard King's place.

Q. Have you been there all your life?

A. No, sir, I stayed with a lot of people, Mr. Henry Lavender and Mr. Fred.

Q. Do you remember the night or day it is said that Mr. Stewart was killed?

A. Yes, sir.

Q. What day of the week was that?

A. Friday, I heard; it was Friday when they found him dead.

Q. What did you do that day?

A. I cut wood all day; me and Miss Pinky Ethridge's boy.

Q. How far is that from Mr. Stewart's home?

A. About three-fourths of a mile.

Q. What time of the day did you quit work?

A. Are you talking about that evening?

Q. Yes.

A. I quit about a half hour by the sun.

Q. I will ask you to state to the court and jury if you saw Yank and this other defendant at any time that day.

A. No, sir, I didn't see them at no time that day.

Q. Did you see them any time that night?

A. No, sir, I sure didn't.

Q. What did you do late that evening after you quit work?

A. I went on home and I met Eddie Giles and Campbell at my house and some others was there. Me and Holley played checks, and after while my brother come and we played checks until 9:00 or 10:00.

Q. What di- you do then?

A. I went to bed after they left.

Q. Did you get up that night?

A. Yes, sir.

[fol. 70] Q. Tell why you got up and left home that night.

A. The reason I left home was because of my woman. I had been working hard for her. She got up and went to the front door and looked out and came back and put the fire up and then come to my bed to see if I was asleep. I was looking at her and just laid there. She went back to her bed and reached up and got her jacket and run out the door. I got up, and when I got up she was going around the house. The old door is hard to come unlatched. I was going on around the house, and she tried to get back from around the corner of the house before I could get out the door. I met her and heard somebody out by the hen house, and this here Bob Cross run out from there and around my house and through my yard.

Q. I will ask you whether there was a fuss at your house that night?

A. Yes, sir. I got my ax and hit at her. I didn't hit her, but I hit at her and I thank God I didn't hit her.

Q. What happened then?

A. I went to Miss Pinky Ethridge's and called Mr. James out and told him I was going to leave because I was being mistreated, and I said——

Mr. Stennis: We object to that.

The Court: Sustained.

Q. What did you do? Don't tell what you told them.

A. I called him out and told him what I had been into and and I was going to leave to keep from getting into trouble. When I first moved to the place, Mr. Lundy Temple told me——

Mr. Stennis: We object.

Q. What did you do there, if anything?

A. I didn't try to do anything.

Q. Where did you go then?

A. I went to my mother-in-law's; I left there and went to Oscar's to spend the night. I left there about 5:00 o'clock and went on to Scooba. I first went to Mr. James Boyd's. [fol. 71] I met this boy and he said Mr. Boyd was going to Electric Mills and that Daisy was going with him. I turned in at his house and asked this girl if I could go, and she said he had a load. I went on to Mr. Temple's and his boy and Mr. Jim Hill was fixing on the car, and I told them what I was leaving about and he said not to leave. I said: "No, I have been mistreated, and I want to leave the country."

Q. Where did you go then?

A. I come on to Electric Mills and caught a beer truck and come on down to Meridian and got there about 10:00 o'clock. I found a fellow there at the house where I was going to. I got to his house about 11:00 o'clock.

Q. What day was that?

A. Thursday.

Q. Was it Thursday or Friday?

A. Friday.

Q. What did you do then?

A. When I got to the house, I set down and rested and walked around a while. I went to my brother's, and one of the boys works for a Jew, I think. I think he is a Jew or a gypsy. I told him I——

Mr. Stennis: We object.

The Court: Sustained.

Q. Were you arrested in Meridian?

A. Yes, sir.

Q. When were you arrested?

A. I was arrested Saturday evening, I guess about 3:00 o'clock.

Q. Were you put in jail?

A. Yes, sir.

Q. Were you in jail on Sunday?
A. Yes, sir.
Q. Who came to see you there on Sunday?
A. A lot of people come there?
Q. Did you have any trouble there Sunday evening?
[fol. 72] A. Yes, sir.
Q. What kind?
A. A whipping spell; Mr. Cliff tore me up.
Q. Tell us about that.
A. Yes, sir. Let me start back at the first where they arrested me. Mr. Cliff Dial and Mr. Poole, that big fellow there, and another fellow come there, Mr. Cliff and Mr. Poole come in the front door and this other fellow come in on the back, and they asked me what I was doing down here. I said that me and my old lady got into it. He said: "No, you didn't. You helped kill Mr. Stewart," and I said: "No, sir." I stuck to it as long as Mr. Poole was with me. Mr. Poole carried me on to jail and give me to the jailer and he left and Mr. Cliff Dial and them come back that evening and whipped me. First I tried to tell the truth, but he wouldn't let me. He said: "No, you ain't told the truth," and I tried to stick to it. He whipped me so hard I had to tell him something. He said: "Ed Brown done told that you helped kill Mr. Raymond." I said: "No, if there is a God in Heaven, I ain't had nothing against Mr. Raymond. He could be at home walking around as far as I know."
Q. Who was present when you and Mr. Cliff tangled up?
A. Mr. Guy Jack and Mr. Howard Nicholson and another tall fellow. I seen him here today, but didn't either one hit me but Mr. Cliff.
Q. When you told them that you took part in this thing, I will ask you to state whether or not you told the truth.
A. No, sir. I was made to tell what I did.
Q. When did you see Mr. Adcock down there?
A. I believe that was Sunday night.
Q. Was it Sunday or Monday night?
A. I think it was Monday night.
Q. Did you make a statement to Mr. Adcock?
A. Yes, sir.
[fol. 73] Q. You heard him testify here?
A. Yes, sir.
Q. Did you make the statement to him that he told the jury?

A. Yes, sir.

Q. Why did you make it?

A. Mr. Cliff put me across a chair three times. He put me across a chair and whipped me with a strop and said it was hurting. I said: "Mr. Cliff, I will tell the truth. I wasn't in it." He said: "You ain't telling the truth." He put me down the second time, and I tried to tell him the same thing, and Mr. Guy Jack said: "He is telling the truth," and Mr. Cliff said I wasn't. That's the reason I told what I did.

Q. You told Mr. Adcock the same story the next day?

A. Yes, sir.

Q. Why was that?

A. Mr. Cliff told me if I didn't tell Mr. Adcock and the other men he was going to whip me again. He said: "Henry, if you don't tell them folks the same thing you told us, I will get meat again." I had rather you all would kill me than let Mr. Cliff get me again.

Q. Is that your ax over there?

A. Yes, sir.

Q. Those overalls or jumper, is that yours?

A. Yes, sir, that is my jumper.

Q. Are those your overalls?

A. Yes, sir.

Q. And that is your jumper?

A. Yes, sir; Mr. Lundy Temple give it to me.

Q. What are those splotches of blood on it?

A. My mother-in-law give my wife some meat, and she wrapped it in that old jumper there.

Q. Tell the court whether or not you had that jumper on that particular day that Mr. Stuart was killed.

[fol. 74] A. No, sir, I ain't had that jumper on in a good while, because it ain't worth wearing. This blood on my ax, I don't know about it. Some fellow might have put it on there. I don't know anything about Mr. Stewart's death.

Q. I will ask you to state to the court and jury if you had a meeting of any kind with Ed and Yank on the day prior to the killing of Mr. Stewart?

A. No, sir.

Q. State whether or not it is a fact that you met them down there somewhere by a gate close to Mr. Stewart's.

A. No, sir, I ain't met them nowhere.

Q. Did you have anything against Mr. Stewart?

A. Not a thing.

Q. Did you live on his place?

A. No, sir. I lived on Mr. Earnest Temple's place.

Q. Tell the court whether or not you promised Ed and Yank to help in the killing of Mr. Stewart for $12.00 each. State whether or not these men offered you any money to help kill Mr. Stewart.

A. No, sir, they ain't offered me a penny. I told Mr. Adcock they offered me money. Mr. Cliff asked what the boys offered me and I had to tell him that, and he asked who hit Mr. Stewart with the foot-ax, and I had to tell that and I didn't know a thing about it. I couldn't hardly tell what room we went in because I don't go around Mr. Stewart's.

Q. I will ask you to tell the court whether you ever admitted to anyone that you struck Mr. Stewart.

A. No, sir, I ain't hit him a lick. If I ever hit him, I hit you, and you know I ain't hit you.

Q. Mr. Adcock and Mr. Stevens and the other man that you made the statement to on Monday evening, did they threaten you?

A. No, sir, not a bit.

Q. You made the statement to them just like they say?

A. Yes, sir.

[fol. 75] Q. Tell just why you made that statement.

A. The reason I told Mr. Adcock that was Mr. Cliff told me if I didn't tell them the same thing he was going to beat me again, and I tried to stick to it. He ain't told a thing I didn't say to him, but it wasn't so.

Q. Why did you tell it then?

A. I was made to tell it. If somebody else had come and arrested me and not whipped me and scared me up so, I would have stuck to what I said. I tried to tell the truth when they first arrested me, but they wouldn't let me.

Q. Did he beat the blood out of you?

A. Yes, sir. The blood ran through my pants, and I had them washed and then I commenced bleeding again. I didn't bleed much more, and I didn't wash them any more.

Cross-examination.

By Mr. Stennis:

Q. When you talked to Mr. Adcock he told you that you didn't have to talk?

A. Yes, sir.
Q. He told you that you didn't have to tell a thing?
A. Yes, sir.
Q. Mr. Dial wasn't there then?
A. No, sir.
Q. He told you that he wanted you to tell the truth?
A. Yes, sir.
Q. He told you he wanted you to make a free statement?
A. Yes, sir.
Q. He wasn't forcing you to say anything?
A. No, sir.
Q. He told you that you were safe from danger then?
A. Yes, sir.
Q. And that he was going to protect you?
A. Yes, sir.
[fol. 76] Q. Still you went on and told what he said?
A. Yes, sir.
Q. And you were telling the truth about it?
A. Yes, sir.
Q. What you told Mr. Adcock that Monday night was so?
A. No, sir, it wasn't.
Q. What do you mean by saying it was and it wasn't?
A. What are you speaking about?
Q. Mr. Adcock told you that he was going to protect you?
A. Yes, sir.
Q. And he wasn't going to bother you?
A. Yes, sir.
Q. Mr. Stevens told you the same thing?
A. Yes, sir.
Q. And you believed them?
A. Yes, sir.
Q. You went right on and talked to them?
A. Yes, sir.
Q. You trusted them?
A. Yes, sir.
Q. You told them the truth, didn't you?
A. Yes, sir.
Q. What about that ax? Do you say you hit your wife and got that blood on your ax?
A. I won't say about that.
Q. Who was that you say you shot? Did you say Bob Cross?
A. No, sir. I didn't shoot him.

Q. You told Mr. Daws you shot him?
A. No, sir.
Q. What was it you told him?
A. I told him I had had trouble with him.
Q. And you told him that you shot him?
A. No, sir.
[fol. 77] Q. Did you have a brother in Meridian?
A. Yes, sir.
Q. How long had you been there when you were arrested?
A. I got there Friday and stayed there Friday night but never did go to his house until the next morning.
Q. You never did get there?
A. Yes, sir, Saturday morning, but I didn't see him.
Q. That was where you were arrested?
A. No, sir, it was at another girl's house in a little place called Drinkwater.
Q. Mr. Dial was one of those who arrested you?
A. Yes, sir.
Q. How long did you say it had been since you wore that jumper?
A. Ever since last year.
Q. Who was it that sent you meat wrapped in it?
A. My mother-in-law.
Q. What did you get from her?
A. The head and a piece of liver and back bone.
Q. How long was that before the killing?
A. You know when people kill hogs in the winter.
Q. That jumper had been laying in your kitchen ever since?
A. Yes, sir; it wasn't any good.
Q. What did you do on Thursday?
A. I cut wood all day long.
Q. What time did you stop cutting?
A. A little before sundown.
Q. And then you went home?
A. Yes, sir.
Q. How far do you live from Ed Brown?
A. Just about a good mile.
Q. How far did you live from Mr. Raymond Stewart?
A. About three-quarters of a mile.
Q. You stopped cutting wood before sundown last Thursday?

[fol. 78] A. Yes, sir.

Q. Did you have that ax there?

A. Yes, sir.

Q. You carried it home with you that day?

A. Yes, sir.

Q. That is the ax you used on your wife that night?

A. Yes, sir.

Q. Where did you leave it lying after you used it that night?

A. I left home, and she had the ax.

Q. I asked you where you left it?

A. She had it.

Q. I thought you said you hit her with it.

A. She grabbed hold of it. We had a tussle, and she had the baby in her arms.

Q. She was holding the baby in one arm and grabbed the ax with the other?

A. Yes, sir.

Q. You were not trying to hit her after all?

A. I wasn't anxious to; I was mad.

Q. You didn't have a fuss with her that night?

A. No, sir.

Q. You didn't have a falling out with her that night?

A. Yes, sir.

Q. How long had it been since you had one before then?

A. It has been about a year. It was about a year before when we moved down from the prairie. That boy had been troubling me up there, and I moved to get away from him.

Q. Where did you move from?

A. I was up there on Mr. Joe Cremmer's place on the prairie.

Q. This $12.00 proposition that you told Mr. Adcock about that you were to get from each one of these boys?

A. Yes, sir.

Q. You never did get anything from them?

[fol. 79] A. No, sir, I didn't get nothing.

Q. They didn't find anything there?

A. I don't know.

Q. They told you they didn't find any money there?

A. No, sir.

Q. Do you think that they found any?

A. Well, boss, I will tell the truth, just like I first started to tell it. I wasn't there with them boys.

Q. They have told you that they killed Mr. Stewart?

A. No, sir.

Q. They said that you were present there, didn't they?

A. No, sir.

Q. You never have heard them say that?

A. No, sir.

Q. Didn't they say, Henry, on Monday night, didn't you hear them say you helped?

A. Yes, sir, I sure did.

Q. Then you have heard them say it?

A. I thought you was talking about they told me alone.

Q. They claim they didn't get any money; what about that?

A. I wasn't with them. I will die with that.

Q. You told Mr. Adcock all that on Monday night?

A. Yes, sir.

Q. And you came up here yesterday and didn't anybody do anything to you?

A. No, sir.

Q. Mr. Adcock told you in Meridian he wouldn't let anybody bother you?

A. Yes, sir.

Q. He told you that that night before he talked to you?

A. Yes, sir.

Q. You did the best that you could to tell him the truth?

A. Yes, sir.

[fol. 80] Q. You stand on that now, what you told Mr. Adcock Monday night?

A. No, sir; I done got off of that now.

Q. Why did you change?

A. What I was telling Mr. Adcock, I was made to tell it.

Q. Who made you?

A. Mr. Cliff Dial.

Q. He wasn't there on Monday night?

A. No, sir.

Q. Mr. Adcock talked to you that night?

A. Yes, sir.

Q. He told you that anybody wasn't going to hurt you?

A. Yes, sir.

Q. You believed him?
A. Yes, sir.
Q. You just went on and told them the truth?
A. Yes, sir.

Redirect examination.

By Mr. Daws:

Q. When you say that you told the truth, do you mean to say you were telling the truth when you told that you participated in killing Mr. Stewart?

A. No, sir. I wasn't telling the truth then. I don't know nothing about it. I don't know how come they put me in it, because I ain't never harmed Mr. Raymond, and he ain't never harmed me.

Q. Now, as I understand you, what you told Mr. Adcock wasn't true?

A. Yes, sir, that's right.
Q. You told Mr. Adcock just what he says you told him?
A. Yes, sir.
Q. You told it because of the beating that you received?
A. Yes, sir.

(Witness dismissed.)

[fol. 81] YANK ELLINGTON, a defendant, after being duly sworn, testified as follows:

Direct examination.

By Mr. Clark:

Q. Where do you live?
A. On Raymond Stewart's place.
Q. Raymond Stewart or Mr. Raymond Stewart?
A. Mr. Raymond Stewart.
Q. What part of the County is that?
A. Kemper.
Q. In the eastern part of the County?
A. Yes, sir.
Q. How far is it from the line?
A. About two miles, I guess.
Q. How old are you?

A. Twenty.
Q. Are you married?
A. Yes, sir.
Q. How many children do you have?
A. Two.
Q. How old are they?
A. One girl two years old and a six months old baby.
Q. Where were you born and raised?
A. I was raised in Alabama.
Q. In what County.
A. In Noxubee County, across the line in Alabama.
Q. How far is that from where you live now?
A. It is about three miles.
Q. How long have you been living on Mr. Stewart's place?
A. About two years.
Q. Did you and Mr. Stewart have a falling out?
A No, sir, none at all.
Q. About how far did you live from his house?
A. About a mile.
[fol. 82] Q. How often did you go to his house?
A. Just now and then.
Q. How often?
A. I didn't go often.
Q. About how often?
A. I go about once a week.
Q. You farmed there, didn't you?
A. Yes, sir.
Q. Where did you keep the mules that you plowed?
A. At my house.
Q. Do you remember when Mr. Stewart was killed?
A. Yes, sir.
Q. When was that?
A. It was on a Thursday.
Q. Last Thursday?
A. Yes, sir.
Q. Sometime last Thursday night?
A. Yes, sir.
Q. That was a week ago today?
A. Yes, sir.
Q. Where were you on that night?
A. At home in bed with my wife.
Q. Did you have anything to do with that killing?

A. No, sir.

Q. When did you first hear about it?

A. That Friday after I come out of the woods from loading poles.

Q. What time was that?

A. About 12:00 o'clock.

Q. What did you do when you heard about it?

A. I went up there. Mr. Williams' son asked me to come up there.

Q. What did you do when you got there.

A. I didn't do anything but set down.

Q. Who all did you see there?

[fol. 83] A. There was a heap more besides me. There was Ellis Lee and a Simmons boy and some other boys.

Q. They are colored folks.

A. Yes, sir.

Q. Were there any white folks there?

A. There wasn't anybody but Mr. Williams.

Q. Did you go in the house and look at Mr. Stewart?

A. No, sir.

Q. You just sat down there?

A. Yes, sir, out doors on a log.

Q. On Thursday, the day that it happened that night, what did you do?

A. I worked on the pasture that Thursday.

Q. Who was with you there?

A. Me and Ed Brown, Beth Shields and some others.

Q. Did you see Ed Brown that day?

A. Yes, sir, him and Mr. Raymond was fixing the gates.

Q. I thought you said he was working on the pasture.

A. No, sir. They was at the corner of the pasture, and after they got through with that, him and Ed went to building on the gates.

Q. Did you see Henry Shields that day?

A. No, sir.

Q. Did you see him that night?

A. No, sir.

Q. Did you see Ed Brown that night?

A. No, sir.

Q. You say that you stayed at home that night?

A. Yes, sir.

Q. Who was there at your house?

A. I stayed at home in bed with my wife.

Q. Who was there besides your wife and children?
A. My mother-in-law and them.
Q. You are charged here with taking part in the killing of Mr. Raymond——
[fol. 84] A. No, sir.
Q. I say you are charged with it; you are indicted along with these other two boys here.
A. Yes, sir.
Q. Did you help kill him?
A. No, sir, I didn't help; I didn't know anything about he was dead.
Q. When were you arrested?
A. Mr. Martin and them come and got me that night I was at home.
Q. What night was that?
A. Friday night they come and got me out of bed and carried me to the house.
Q. What house?
A. Mr. Raymond's. They tied me up there with my hands together that way to a tree and whipped me.
Q. Who tied you?
A. Mr. Martin.
Q. Who was there in the crowd?
A. Mr. Martin and his boys and Mr. Hal Byrd and Mr. Cliff.
Q. Mr. Cliff Dial?
A. Yes, sir.
Q. What did they do after they tied you?
A. They whipped me good.
Q. Was that all?
A. They hung me twice; they pulled me up to a limb twice.
Q. What is the mark on your neck?
A. That's where they pulled me up to the limb twice.
Q. That was done with a rope?
A. Yes, sir.
Q. They pulled you up twice on a limb?
A. Yes, sir.
Q. Did it hurt you?
[fol. 85] A. Yes, sir.
Q. When they let you down, could you stand up?
A. Yes, sir.
Q. How long did they keep you swinging up there?
A. Not so long.

Q. Did you ever tell them you knew anything about it that night?

A. No, sir, I didn't tell them nothing.

Q. What did they do then?

A. They turned me loose and told me to go home, and I just could get home.

Q. What did you do then?

A. I got in bed, and my wife rubbed me.

Q. How long did you stay there?

A. Until Saturday morning. Then I went to my father-in-law's.

Q. Who carried you to Meridian?

A. Mr. Cliff and Mr. Russell.

Q. Mr. Russell who?

A. Mr. Russell what stayed on that place—Mr. Russell Dudley.

Q. What time did they take you to Meridian?

A. I don't know exactly what time, but it was pretty early.

Q. Was it Saturday?

A. Yes, sir.

Q. After dinner or before?

A. Before dinner, I think.

Q. Which way did they carry you?

A. Through Gainesville.

Q. Is that the nearest way to Meridian?

A. Yes, sir.

Q. What did they tell you they were taking you that way for?

A. For safe-keeping.

Q. Did anybody bother you on the way?

A. After we got on the other side of Livingston, they took me out and whipped me again and told me tell what I knowed about it.

[fol. 86] Q. Who did?

A. Mr. Cliff.

Q. What did you tell him?

A. I had to tell him. He asked who had the chisel, and he said I had it. I told him I didn't, and he kept on beating me until I had to say I had it.

Q. What else did you tell? Did you tell about Ed Brown and Henry Shields?

A. Yes, sir.

Q. Why did you tell that? Did you tell it because he was whipping you?

Mr. Stennis: We object to that.

Q. Tell why you told that?

A. Because Mr. Cliff was beating me so hard I had to tell it.

Q. Did you tell him the truth or a lie?

A. I told a story because I didn't know nothing about Mr. Raymond's death.

Q. What time did you get to Meridian?

A. I don't know exactly what time.

Q. Who do you reckon does know?

A. I guess he does. It was before sundown.

Q. On Saturday?

A. Yes, sir.

Q. Did you ever get any more whippings after that?

A. I didn't get any more then.

Q. You didn't get any more at all?

A. No, sir.

Q. You made your confession before you got to Meridian?

A. Yes, sir; he made me tell it.

Q. Were you there Sunday when Ed and Henry got their floggings?

A. I think I was there, but I was up stairs.

Q. You didn't see that?

A. No, sir.

[fol. 87] Q. On Monday night, Mr. Adcock and Mr. Stevens, the Sheriff of Lauderdale County, and his brother and several others came in there and you talked to them?

A. Yes, sir.

Q. Did they threaten you in any way?

A. No, sir.

Q. They treated you nice?

A. Yes, sir.

Q. What did they say to you?

A. They asked me what did I do, and I was scared and went on and told about us killing Mr. Raymond.

Q. Did you tell it like Mr. Adcock and Mr. Stevens said?

A. Yes, sir, I told it that way.

Q. Was it true or not?

A. No, sir, that was a story.

Q. They told you that they were not going to whip you?
A. Yes, sir, but I was scared.
Q. What had Mr. Cliff told you?
A. He said if I didn't tell him the same thing I told him, he was going to get on me again.
Q. And you did tell what they said you did?
A. Yes, sir.
Q. But you say that it was not true?
A. No, sir, it ain't true.
Q. Did they whip you pretty bad?
A. Yes, sir; this side is swollen as tight as I don't know what.
Q. Did they get any blood?
A. Yes, sir; I have got a bandage on it now.

Cross-examination.

By Mr. Stennis:

Q. Now, Mr. Raymond Stewart got the wrong information one time and accused you of stealing some cotton seed, didn't he?
A. Yes, sir.
[fol. 88] Q. He accused you of stealing it?
A. Yes, sir.
Q. But you were not guilty?
A. No, sir, I didn't steal it?
Q. You didn't like to be accused of stealing cotton seed when you were not guilty?
A. I told him I didn't steal it.
Q. It kind of made you mad, didn't it?
A. No, sir, It didn't make me mad at all.
Q. But you didn't like to be accused of stealing it?
A. That's right, but it didn't make me mad.
Q. He kept on after you about it?
A. No, sir.
Q. When was the last time he mentioned it before his death?
A. It ain't been mentioned no more.
Q. How long before he died had he talked to you about it?
A. He ain't talked since the night I had the seed.
Q. You got the seed?
A. No, sir, I didn't get them.

Q. How long was that before his death?
A. I don't know.
Q. About a month?
A. It has been more than that.
Q. He had been after you about it several times?
A. Yes, sir.
Q. You told Ed Brown that you were going to kill Mr. Stewart if he didn't quit fooling with you about it?
A. No, sir, I wouldn't have killed him for nothing?
Q. You say that Mr. Adcock told it just like you told him?
A. Yes, sir, I sure told him.
Q. Were you there when Ed and the other boy got whipped?
A. I was there, but I wasn't where they was.
Q. Could you hear it going on?
[fol. 89] A. No, sir.
Q. You talked to Mr. Adcock the day that you were brought to jail?
A. Yes, sir.
Q. Then you were not brought until Monday?
A. No, sir, I sure wasn't.
Q. You were not there when the other boys were whipped?
A. Let's see.
Q. You were brought to jail the day that Mr. Adcock came down there?
A. Yes, sir.
Q. They told you that you didn't have to tell anything, didn't they?
A. Yes, sir.
Q. And they told you none of them were going to bother you?
A. Yes, sir.
Q. They told you they wanted you to tell the truth?
A. Yes, sir.
Q. And you went on and told it?
A. No, sir.
Q. Didn't you know that you were getting in worse trouble in admitting that you did it?
A. But I didn't kill him.
Q. You knew that you were safe there?
A. I was scared.
Q. You believed them when they said they were going to treat you right?

A. They sure told me that.
Q. You had confidence in them?
A. Yes, sir.
Q. And you told them the truth?
A. No, sir, I told a story.
Q. You admitted that you had a part in killing this man?
A. Yes, sir.
Q. Did you think that you would better your position any by telling it?
[fol. 90] A. No, sir, I told a story.
Q. Did you think that you would be better off by telling a lie than if you hadn't told it?

Mr. Clark: We object to telling a lie.
The Court: Overruled.

Q. You thought you would be safer to say you had a part in killing Mr. Stewart?
A. No, sir, I was scared.
Q. You were scared over there when you were strung up?
A. Yes, sir.
Q. You didn't tell it then?
A. No, sir.
Q. Why didn't you?
A. I tried to hold it; I told them I wasn't in it.
Q. You tried to hold it back?
A. Yes, sir.
Q. You were scared over in Alabama, were you not?
A. Yes, sir.
Q. But you told it there?
A. After they whipped me so bad, I had to tell something.
Q. What was it you told them in Alabama?
A. I told them about me and Ed Brown was in it and that boy yonder, but that was a story.
Q. What did you say about Ed?
A. They said: "What did Ed have to do with it? Didn't he have the foot-ax?", and I said he did.
Q. What did you have?
A. They kept whipping me, and I told them I had the chisel.
Q. What did you tell that Shields had?
A. I said I didn't know, and they kept whipping me and said: "Didn't Shields have an ax?", and I said he did.

Q. What room did you tell that you put Mr. Stewart in?
A. I told we put him in the seed room.
[fol. 91] Q. How did you know which room to say?
A. Mr. Williams called us up there that day.
Q. You just said that you said you used a chisel because Mr. Dial told you to?
A. Yes, sir.
Q. You told him where you put it?
A. Yes, sir. He asked did I lay it back on the box, and I had to tell him something.
Q. What did you tell him Mr. Stewart had in his pocket.
A. I didn't tell nothing about what he had in his pocket.
Q. He didn't say anything to you about what Mr. Stewart had?
A. No, sir.
Q. What did you tell about how much money you were going to get?
A. I told him I didn't know anything about it.
Q. How much did you tell the Sheriff you were going to get?
A. I didn't tell him how much.
Q. Did you tell the Sheriff or anyone else that Shields was to get part of it?
A. Yes, sir.
Q. How much did you say he was to get?
A. We didn't have no certain amount.
Q. It was just going to be divided three ways?
A. Yes, sir.
Q. If it was $150, each man would get a third?
A. Yes, sir.
Q. You were going to share alike?
A. Yes, sir.
Q. That was the agreement you had before you went up there?
A. No, sir, I ain't never been up there.
Q. You worked for Mr. Stewart last year?
A. Yes, sir.
Q. You were in on the cotton plow-up campaign?
A. Yes, sir.
[fol. 92] Q. Ed Brown had some in it?
A. Yes, sir.
Q. Did you ask Mr. Stewart for your money on that?
A. No, sir. I told him to take that $12.00; I told him I would give him the other when I sold the cotton.

Q. When was that?
A. The day I sold the cotton.
Q. How long was that before he died?
A. A long time. I give him $11.00; that was all that was coming.
Q. Did you give Ed Brown his check?
A. I don't know.
Q. Now, you plead guilty here yesterday?
A. Yes, sir.
Q. You were not any different yesterday from what you are now?
A. Yes, sir.
Q. You were not scared then?
A. Yes, sir.
Q. You had two lawyers appointed for you?
A. Yes, sir.
Q. You came up here this morning and had two more?
A. Yes, sir.
Q. Mr. Dial didn't do anything to you yesterday?
A. No, sir, but I was still scared.
Q. You came here today and after you had been in the Court room about half the morning, Mr. Dial hadn't done anything to you?
A. No, sir.
Q. You never were scared of Mr. Adcock?
A. Yes, sir, I am scared of all white people.
Q. When you went up here where the beds are, you told Mr. Adcock you wanted to speak privately to him?
A. Ed Brown told him.
Q. You went off to speak to him?
A. No, sir.
[fol. 93] Q. You didn't say anything at all?
A. No, sir, Ed Brown was the one that done the talking.
Q. You agreed with Ed?
A. Yes, sir.
Q. What did Ed tell him?
A. About his wife, but that was a story about between him and his wife; I couldn't hear him good.
Q. Ed said what he said Monday night was so?
A. No, sir, it was a story.
Q. Ed told Mr. Adcock up here where the beds are that what you all had told him on Monday night was so?
A. Yes, sir.

Q. And you said: "Yes, sir, Mr. Adcock, we told you the truth Monday night."?

A. Yes, sir.

Q. That was at about dinner time?

A. Yes, sir, but we told a story.

Q. What prompted you to tell it?

A. I was scared.

Q. Are you scared now?

A. Yes, sir.

Q. Mr. Adcock didn't even bring it up; you and Ed are the ones that brought it up?

A. Yes, sir.

Q. He hadn't said a work to you about it?

A. No, sir.

Q. What else did Mr. Adcock say to you up there?

A. I think that was all he said.

Q. You haven't told anything he said; what did he say?

A. He said he would have to see our lawyers, or something.

Q. Didn't anybody do anything to you on Monday night?

A. No, sir.

Q. After you got through talking, you told them you felt [fol. 94] better and asked for a cigarette?

A. I sure did.

Q. And they gave you a cigarette?

A. Yes, sir.

Q. Did you feel better?

A. A little better.

Q. You felt like you could sleep a little better, didn't you?

A. I didn't sleep none.

Q. You thought then that you were going to get some sleep?

A. No, sir.

Q. What was it that made you feel better?

A. After the other boys commenced telling it, after that we all agreed it was like that.

Q. You felt like you had it straightened out?

A. No, sir, it was sure wrong.

Q. You say you were scared. Which did you think was the worst, to be whipped some more or admit killing this white man?

A. I would rather be whipped, because I ain't killed Mr. Stewart.

Q. You told them Monday night that there wasn't anybody else in it except you three.

A. Yes, sir, that's all.

Q. That was the truth?

A. No, sir.

Q. There were some more in it?

A. No, sir, there wasn't anybody in it?

Q. You said there wasn't anybody in it but you three?

A. I told it because I was scared.

Q. Mr. Dial didn't make you say that, did he?

A. No, sir. I was scared.

Q. Why did you tell on the other boys? He didn't make you tell on them, did he?

A. He whipped me until I had to tell something.

Q. Why did you pick these two?

[fol. 95] A. Because they was already down there.

Q. You just put them in it with you?

A. Yes, sir. They put me in it, and after that they said all was in it but I come to find out that there ain't none of them in it.

Q. When did you find that out—just a little while ago?

A. Yes, sir.

Q. That was the first time you heard them say that?

A. That Shields boy, I heard him say he didn't.

Q. You heard him say Monday night that he did?

A. No, sir.

Q. Shields admitted going there to get some money out of it?

A. No, sir, I didn't hear him say nothing about any money.

Q. He didn't get any, did he?

A. We didn't go and look for none, because I didn't get out of my bed.

(Witness dismissed.)

Court here recessed until 8:30 A. M., March 26, 1934.

Mr. Stennis: Comes the District Attorney and informs the Court and defense counsel that the State now has available further and additional testimony for the State that was not available at the beginning of the trial. This testimony consists chiefly of finger prints taken from specimens

found at the scene of the homicide. These defendants were arraigned in open court the day before trial commenced and all entered pleas of guilty. The work on the finger prints was not then complete, and it was not completed and available until Friday morning. It was therefore not available at the time that the State presented its case in chief. The State moves the Court to permit the introduction of this testimony either at this time or at a subsequent time during the progress of the trial.

Mr. Clark: The defendants object to this testimony because the State has closed its case, and this is an unusual line of testimony and the defendants have not had an op-
[fol. 96] portunity to avail themselves of finger print experts who might know this line of testimony in order that they might contradict the testimony offered by the State. For that reason the defendants object.

Mr. Stennis: The District Attorney states that the reason that this testimony was not developed and available at the beginning of the trial was that the District Attorney was reliably informed that all the defendants had fully confessed to their implication in the crime, and the District Attorney himself had arraigned all three defendants in open court, and the defendants Ed Brown and Yank Ellington then and there entered pleas of guilty to the charge of murder, and it wasn't considered necessary then to develope the finger prints, and the State was therefore taken by surprise with the defense presented by the defendants.

The Court: Under the circumstances, it is of course out of order to present this now, but I can see how the state was misled as to the necessity of any such testimony, and I think it is proper to admit it at this time for the benefit of everybody. Any light that can be obtained on this case should be given. As to the objection that they didn't anticipate this evidence, this evidence shows that the impressions or whatever you call them were found at the scene. I think under the circumstances it ought to be admitted.

Mr. Daws: Now come the defendants and move the court to continue this cause for the reasons already assigned in the objection made by Mr. Clark.

The Court: I will give you time to get experts on finger prints if you want them if they are to be had, and I presume that they are. After this evidence is presented by the State, if you wish to rebut it, I will allow time to secure experts

if they can be had within a reasonable time, and I will allow such a reasonable time. The motion is overruled.

Mr. Stennis: I will introduce this testimony now if the attorneys for the defendants are willing.

Mr. Clark: You may introduce it now if you wish, or you [fol. 97] can wait until later. It will take only a short time for us to finish however.

Mr. Stennis: All right, you finish your case first then.

Ellis Lee Giles (Colored), a witness for the defendants, after being duly sworn, testified as follows:

Direct examination.

By Mr. Clark:

Q. Where do you live?
A. I live on Mr. Raymond Stewart's place.
Q. How long have you been there?
A. I have been there about 17 years.
Q. You and Mr. Raymond were good friends?
A. Yes, sir.
Q. Do you know Henry Shields?
A. Yes, sir.
Q. Do you remember when Mr. Stewart was killed?
A. Yes, sir.
Q. Was that on Thursday night?
A. Yes, sir.
Q. Did you see Henry Shields that afternoon?
A. Yes, sir, I saw him first a little bit before sun-down.
Q. Where was he then?
A. He was at home then.
Q. How far did he live from Mr. Stewart's home?
A. Well, just about a quarter of a mile, the best I can get at it.
Q. What was the occasion of your seeing him?
A. My wife went to her mother's, and I started to see her. I stopped and played checks with him until first dark.
Q. With Henry Shields?
A. Yes, sir.
Q. Who else was there?
[fol. 98] A. Wilson Campbell, Hervey Shields, Harry Carr and a fellow named George.
Q. You left there at first dark?
A. Yes, sir.

Q. Did you see Henry any more?

A. No, sir.

Q. Did you see Ed Brown or Yank Ellington that afternoon?

A. I saw them about 2:00 o'clock. We was working on the pasture together and after we left Mr. Raymond sent me and papa to the gate first, and he sent them another way and I haven't seen them any more until yesterday. I saw them the day after the killing when we was all up at the house.

Cross-examination.

By Mr. Stennis:

Q. How far did you say this boy lived from Mr. Stewart?

A. As near as I can get at it, between a quarter and a half.

Q. How far did Shields live from Ed Brown?

A. A good half mile.

Q. Ed Brown lives close to Mr. Stewart too?

A. Yes, sir.

Q. You don't know where he had been before you came along there?

A. No, sir, I don't know where he had been, but when I got there he told me he had been cutting wood.

Q. You don't know how long he had been at the house?

A. I and him met at the house.

Q. You came up there at the same time?

A. He came up on one side and I came up on the other.

Q. Which way did he come from?

A. From toward the public road just below Miss Ethridge's.

Q. Is that in the direction of Ed Brown's?

A. No, sir. Ed Brown lives to the west, and the direction he was coming from was the south, but he was near the house then.

Q. That was before sun-down?

[fol. 99] A. Yes, sir.

Q. Did he have an ax then?

A. I don't know.

Q. You played checks until after first dark?

A. Yes, sir.

Q. And you left then?

A. Yes, sir.

Q. You don't know anything about what happened after then?

A. No, sir, I never saw Henry no more until yesterday.

(Witness dismissed.)

KATE ELLINGTON (Col.), a witness for the defendants, after being duly sworn, testified as follows:

Direct examination.

By Mr. Clark:

Q. Do you know Yank Ellington?

A. Yes, sir.

Q. What kin are you to him?

A. That's my husband.

Q. How long have you been married?

A. Three years.

Q. Where do you live?

A. We live on Mr. Raymond's place.

Q. How long have you been there?

A. We been there about two years.

Q. You and Yank and Mr. Stewart got along alright?

A. Yes, sir.

Q. Have you ever had any trouble?

A. No, sir.

Q. Do you remember the night it is said Mr. Stewart was killed over there?

A. Yes, sir.

[fol. 100] Q. What day of the week was that?

A. I don't know what day of the week it was, but they said it was on Thursday night.

Q. Do you know where Yank was that night?

A. Well, Judge, I am going to tell the truth about that. When I laid down he laid down with me. He went to bed, and I went to sleep, and if he left I don't know nothing about it.

Q. Was he there when you woke up?

A. Yes, sir. He went in the woods to cut some poles to build a hog pen.

Q. You tell the jury that he stayed with you all night?

A. Yes, sir, I sure told them that.

Q. He stayed with you that night; how many children have you?

A. Two.

Q. Did you sleep sound that night?

A. Yes, sir. You know when you go to sleep, you go to sleep.

Q. If Yank left, you don't know anything about it?

A. If he left, I don't know nothing about it.

Cross-examination.

By Mr. Stennis:

Q. You went to sleep and woke up the next morning?

A. Yes, sir. He was at home when I woke up.

Q. You don't know whether he got up and left between those times or not?

A. No, sir, I don't know about that.

Q. There has been something said about folks getting after Yank the night that Mr. Stewart's body was found. Mr. Cliff Dial took up for him, didn't he?

A. Yes, sir.

Q. And protected him?

A. Yes, sir.

Redirect examination.

By Mr. Clark:

[fol. 101] Q. He didn't take up for him until after they handled him pretty rough, did he?

A. That night when they carried him to the house, he took up for him when they hung him twice. He didn't let them do anything else after they beat him.

Q. Did he help hang him?

A. I don't know.

Q. What kind of shape was he in when he got home?

A. He was beat pretty bad.

Q. How do you know Mr. Dial took up for him?

A. He told me. He said he told the men not to bother him no more.

Q. Did you see Ed Brown or Henry Shields that night?

A. No, sir, I ain't seen none of them.

Recross-examination.

By Mr. Stennis:

Q. You say Yank told you himself that Mr. Dial took up for him and told them not to bother him any more?

A. Yes, sir, he told me that.

(Witness dismissed.)

IRENA BROWN (Colored), a witness for the Defendants, after being duly sworn, testified as follows:

Direct Examination.

By Mr. Clark:

Q. Do you know Ed Brown?

A. Yes, sir. He is my husband.

Q. How long have you been married?

A. 5 years.

Q. How many children have you got?

A. We ain't got none.

Q. Do you know Henry Shields and Yank Ellington?

A. Yes, sir.

[fol. 102] Q. Where do you live?

A. We stays on Mr. Raymond Stewart's place.

Q. How long have you been there?

A. Two years, going on three.

Q. You and Mr. Raymond and Ed get along all right?

A. Yes, sir.

Q. Did you have any trouble?

A. No, sir.

Q. Do you remember the night that it is said Mr. Stewart was killed?

A. Yes, sir.

Q. What night of the week was that?

A. Thursday.

Q. Do you know where Ed was that night?

A. Yes, sir. After sundown we was on our way to a colored woman's house and we met Mr. Raymond, and Ed had his pistol in his pocket.

Q. Whose pistol?

A. Mr. Raymond's. He had been letting him keep it. When we met Mr. Raymond he spoke about it.

Mr. Stennis: We object to what was said.

A. We met him and Ed give him the pistol, and we went on to where we was going.

Q. Where did you go?

A. To Fannie Little's.

Q. What time did you leave there?

A. Early in the night; we come on back together.

Q. What did you do then?

A. We set up and roasted sweet potatoes and then we both went to bed.

Q. What time was that?

A. Around 9:00 o'clock near as I can get at it.

Q. Did you go to sleep?

A. Yes, sir, I went to sleep.

Q. Did Ed get up that night?

A. Not as I knows of; if he got up, I don't know it.

[fol. 103] Q. When did you see him next?

A. When I got up. The sun was up when I woke up.

Q. Do you tell the jury that he didn't leave the house that night, so far as you know?

A. If he left the house, I don't know anything about it. I woke up that morning after the sun was up.

Q. Did you see Yank Ellington and Henry Shields that night?

A. No, sir, I didn't see them at all.

Cross-examination.

By Mr. Stennis:

Q. You say that you and Mr. Stewart were good friends and that Ed and Mr. Stewart were good friends?

A. Yes, sir.

Q. You all have been living there a good while?

A. We have been staying there two years, going on three.

Q. Mr. Stewart let Ed work around the house and barn and trusted him?

A. Yes, sir.

Q. He let him carry the keys?

A. He didn't let him tote the keys.

Q. He let him have them sometimes?
A. When he was at the house and locked the crib.
Q. Sometimes Ed forgot to bring them back to him?
A. No, sir, I don't remember it.
Q. He would have them sometimes?
A. I don't remember him having them.
Q. Sometimes he would have them around the barn and would bring them on home?
A. No, sir, I don't remember him ever bringing them home.
Q. You went to sleep about 9:00 o'clock, you say?
A. Yes, sir, us got back about 9:00.
Q. Did you go right to sleep?
A. Yes, sir; I never woke up that night.
[fol. 104] Q. Ed was still in bed when you got up?
A. Yes, sir, I left him in bed.
Q. How long had he had Mr. Raymond's pistol?
A. Ed had done had it about two months.
Q. Did he have Mr. Raymond's shot gun?
A. Yes, sir.
Q. How long had he had it?
A. He got it the first year we moved there.
Q. He had had it ever since?
A. Yes, sir.
Q. What did Ed do Thursday before the killing?
A. He worked on the pasture.
Q. Did he work on it the next day?
A. No, sir.
Q. What did he do on Friday?
A. That Friday morning I got up and cooked breakfast and he got up and washed his face and had breakfast and went up to Mr. Adams.
Q. What kind of work did he do?
A. He didn't do any work. He was planning on going to Scooba.

Redirect examination.

By Mr. Clark:

Q. Where was Mr. Raymond's shot gun that night?
A. There at home.
Q. At Ed Brown's home?
A. Yes, sir.

Q. Where is it now?

A. I don't know. Mr. Dudley taken it away Friday night, and I haven't seen it since.

(Witness dismissed.)

MARY SHIELDS (Colored), a witness for the Defendants, after being duly sworn, testified as follows:

[fol. 105] Direct examination.

By Mr. Clark:

Q. Do you know Henry Shields?

A. Yes, sir, he is my husband.

Q. How long have you been married?

A. Five years and four months.

Q. How many children have you got?

A. Two.

Q. Do you remember the night it is said that Mr. Raymond Stewart was killed?

A. Yes, sir.

Q. Where were you that night?

A. I was at home.

Q. Who was there with you if anybody?

A. After my husband left?

Q. Yes.

A. Judge Young and my two children.

Q. Did you and your husband eat supper together that night?

A. Yes, sir.

Q. What did he do that day?

A. He cut wood all day.

Q. For whom?

A. Yes, sir, he cut wood that day.

Q. Who else was there at the house that afternoon or night?

A. Ellis Lee Giles, Hervey Shields, Willie Shields, Harry Carr and John Tiller.

Q. What time did they get there?

A. After the doodle-bug run.

Q. Is that a train that you are talking about?

A. Yes, sir; it runs out of Scooba.

Q. What time of night does that get there?

A. I don't know what time it runs.

Q. Was it at night or in the evening?

[fol. 106] A. Yes, sir, it was the evening train going south.

Q. What did those folks do there at your house?

A. They played checks.

Q. How long did they play?

A. They stayed about an hour.

Q. Did they eat supper there?

A. No, sir; we had eat supper when they come.

Q. What happened after they left your home?

A. Me and my husband got into it.

Q. What do you mean?

A. We got into a fuss.

Q. Did he strike you?

A. No, sir, he didn't hit me. He got an ex, to hit me, and I run and taken it and it knocked a place on my leg right there.

Q. Did it knock any blood out?

A. It knocked the skin off, and I put white vaseline on it.

Q. Show the jury that place.

A. Yes, sir, right there. It bled clean down to my feet.

Q. You all were scuffling over the ax when that happened?

A. Yes, sir, I taken the ax from him.

Q. What time of night was that?

A. About 9:00 or 10:00 o'clock.

Q. What became of Henry then?

A. He taken his clothes and left and said he was going to leave. I went to the door and told him if he was going to leave on that account, he just wanted to go. I said: "What am I going to tell Mr. Ethridge in the morning?" and he said: "I am going by to tell him."

Mr. Stennis: We object to that.

The Court: Sustained.

Q. He left and took his clothes?

A. Yes, sir.

Q. When did you next see Henry?

[fol. 107] A. The other evening when you all got me out there and brought me up here.

Q. That was the first time you had seen him?

A. That's the first time I laid eyes on him since he left that night.

Cross-examination.

By Mr. Stennis:

Q. You say that you took the axe away from Henry?
A. Yes, sir, I certainly did.
Q. He wasn't trying to hit you much, was he?
A. He must not to let me take it away from him.
Q. You had a baby in your arms then?
A. Not then. After the baby jumped up and cried after I taken the axe, I went and got her.
Q. What did you do with that axe?
A. I set it in the house.
Q. What became of it then?
A. The next morning the boy with us got up and split some wood.
Q. What was his name?
A. Judge Young; that is what his mother went by.
Q. As soon as you got the axe away from Henry you laid it at the side of the door?
A. Yes, sir.
Q. You didn't have anything more to do with the axe?
A. No, sir.
Q. When you fell on the bench, it wasn't the axe that hit you?
A. Yes, sir, I fell on the bench.
Q. Where was the axe then?
A. In my hand, I was taking it from Henry then.
Q. As soon as you got it, you threw it aside?
A. No, sir, I held it in my hand a while; I had it until Henry left.
Q. You were just holding that for protection?
A. Yes, sir, to keep him from taking it away from me; [fol. 108] after he left I set it aside.
Q. After that you put some vaseline on your leg?
A. Yes, sir.
Q. You didn't get any blood on the axe from your leg?
A. No, sir; if I did, I didn't notice anything about it.
Q. You didn't pick up the axe any more?
A. No, sir.
Q. This boy, Judge Young, cut wood with the axe the next morning?
A. Yes, sir, he split wood; it was sawed in fire lengths.
Q. Did he tell you why he covered the axe up out there?

A. No, sir. He left there and said he was going up to my mother's house.

Q. Were you there when Mr. Lavander found the axe?

A. No, sir.

Q. You don't know why that blood was on it?

A. No, sir.

Q. You didn't put it on there?

A. No, sir; if I did, I don't know nothing about it.

Q. What became of Bob Cross?

A. I don't know; I couldn't tell who it was?

Q. How many times did Henry shoot at Bob?

A. Not a time.

Q. He didn't have anything to shoot with?

A. He didn't have nothing to shoot with?

Q. And he didn't shoot him?

A. No, sir.

Q. You say he carried his clothes with him; he didn't carry his shoes, did he?

A. He didn't carry his work shoes.

Q. Where did he leave them?

A. Sitting at the side of the dresser at home.

Q. He carried everything else that he had?

A. Yes, sir.

[fol. 109] Q. He put on his Sunday shoes?

A. Yes, sir. He wore overalls and a jumper and a shirt and he got on away from there. He was toting his other shirts and Sunday pants.

Q. Whose jumper is that?

A. That is an old jumper that Mama give me fresh meat in; I put it down in the old dirty clothes bag.

Q. Whose jumper was it?

A. That's my father's old jumper what I got from my mother's house with meat in it.

Q. When did that happen?

A. That was since Christmas.

Q. What was in it when it came to your house?

A. There was a piece of head in it and a piece of back bone and a piece of spare ribs.

Q. That was fresh meat?

A. Yes, sir.

Q. You say that it was since Christmas?

A. Yes, sir.

Q. Where did you put that jumper?

A. I throwed it in the dirty clothes bag.
Q. Whose axe is that?
A. That was our axe.

Redirect examination.

By Mr. Clark:

Q. When this boy came on you with that axe, did it have any blood on it?
A. No, sir, I don't know; he had had it all day.
Q. Do you know anything about that new looking rust on it?
A. No, sir, I certainly don't.
Q. It was right after Christmas that you brought that meat there?
A. Yes, sir.
Q. You hadn't used that jumper since that time?
[fol. 110] A. No, sir; I hadn't ever even washed it.
Q. That was about Christmas week?
A. It was about two weeks after Christmas.
Q. And it hadn't been used since that time?
A. No, sir.
(Witness dismissed.)

The defendants rest.

Mr. T. D. Harbour, a witness for the State, in rebuttal, being duly sworn, testified as follows:

Direct examination.

By Mr. Stennis:

Q. Where do you live, Mr. Harbour?
A. In Meridian.
Q. What kind of work are you engaged in?
A. I am with the police department identification bureau.

Mr. Clark: I want to object again to this testimony for the reasons given heretofore.
The Court: I overrule the objections for the reasons already given.

Q. You have charge of the identification bureau?
A. I have.
Q. You do finger print work?
A. Yes, sir.
Q. How long have you been engaged in this work?
A. In finger-print work about eleven years; I have been down there fourteen years.
Q. You prepared yourself and have been engaged in this work for eleven years?
A. Yes, sir.
Q. Are you qualified to make comparisons of finger-prints?
[fol. 111] A. I am.
Q. Did you go to the scene of Mr. Raymond Stewart's death and take any impressions there?
A. I went up there today a week ago.
Q. You went to his home?
A. Yes, sir.
Q. What object, if any, did you find there from which you took impressions?
A. A lamp and a lamp burner.
Q. Where was that burner?
A. The lamp and the lamp burner were in the seed house; that was a room in the house with seed in it.
Q. Where was it when you picked it up?
A. It was about 30 inches from Mr. Stewart's head.
Q. Was the body still there?
A. The body was just inside the door. There was a molasses barrel in there. The body was lying on its back with the legs pushed back four or five inches between where it was and the door.
Q. Tell what you did there and what later developed.
A. When I got there, Mr. Jenkins and myself and Mr. Kelly from Memphis and the Sheriff and several more were there; they told us there had been several people in the house but not in the room. They said that——

Mr. Clark: We object to that.
The Court: Sustained.

A. I went in the house at the back door near the well and observed a tool chest with the lid open. There was a sweet gum stick about five feet long sticking in this door.
Q. I just wanted you to tell what you did about taking finger-prints.

A. I didn't take any impressions at the scene of the crime. I went in the door and picked up the lamp and the lock that was laying in the middle of the floor about four and a half feet from the tool chest. It was laying there [fol. 112] unlocked, and a chisel was laying on the left hand side of a tray of the tool*d* chest. It looked like it was thrown down on top of the tool*d* chest, and I picked that up and this lock and got the lamp and the burner. The burner and the lamp was together. I preserved that stuff and took it to Meridian and locked it up in order to get finger-prints of this stuff. That night I taken finger-prints of several negroes that the officers brought up there. There were impressions on this lock. This wick had cotton seed and blood all over the sides, and there was some on the lamp. This wick burner had been set afire from the under side; it was burned on both sides. When the burner is taken off, there are three or four finger-prints or impressions there; there is one and there is one and there is another one. When we got there the burner was unscrewed; whoever unscrewed it at that time, their hands were moist with perspiration. The lamp itself had cotton seed on it, but there are prints right in there and there and right there. That is a good print right there and there is another one. These prints here were taken at Mr. Stewart's residence of Ed Brown and Yank Ellington, and Henry Shields prints were taken in my office on Saturday after I was in Mr. Stewart's house on Friday. The print here on the lamp is Ed Brown's right ring finger. There is a print under here under the bowl of the lamp of Ed Brown's right forefinger and some other prints under it. The reason that the prints are not developed in a 24-inch frame is that when they talked to the negroes they confessed, and then they told us not to go any further with it. There are two prints here that go with Ed Brown's card, one is his right ring finger and the other is his left fore-finger.

Q. You are certain that the print that you got off that lamp is the same as the prints that you took from Ed Brown?

A. Yes, sir.

Cross-examination.

By Mr. Clark:

[fol. 113] Q. Nobody but you could tell whether that *is* right or not?

A. Yes, sir.

Q. Another finger-print expert could?

A. I could make prints of this and enlarge it to where the ridges would be as large as a pencil, and you could swear that they are the same yourself. I could make them the same size and point out the characteristics to you; where you get the identification is inside the ridges.

Q. No two men have the same?

A. You identify them by the way they turn, the pores, the sweat glands and the beginning and endings of the ridges.

Q. They have places to teach you this just like medical colleges?

A. Yes, sir. You have got to prepare yourself like a dentist or doctor or lawyer, but I can take that thing and enlarge the prints to such an extent that I can point out to you the characteristics in this particular print and on the one picked up at the scene of the crime.

Q. That doesn't take experience to tell that?

A. Not after the prints have been prepared.

Q. Which was did you say was this boy's print?

A. His right ring finger.

Q. All of these prints on this card are the same?

A. That is his right thumb, his forefinger, his middle, ring and little finger. Over here is his left hand.

Q. Who are other finger-print experts in Meridian? Are there others?

A. No, sir.

Q. Where is the closest one?

A. In Birmingham and New Orleans.

Q. Are there any in Jackson?

A. No, sir.

Q. Of course, you have no interest in this case?

A. Not a bit in the world.

[fol. 114] Q. You are positive that these are Ed Brown's prints on here?

A. There are other prints on there that I don't know whose they are.

Q. But these are Ed Brown's; you know that?

A. Yes, sir.

Q. You say you took these at Mr. Stewart's residence?

A. No, sir. I carried those four articles to my office. When you go to a place like that, there are som many dif-

ferent chemicals and powders that you have to use, and there is a regular printing machine that you use.

Q. Has there ever been a case where finger-prints proved a failure?

A. No, sir; the only thing that is a failure in finger-prints is a crooked expert. There is no failure in finger-prints.

Q. How long would they stay on that lamp if it wasn't molested?

A. Without doing anything to it?

Q. Without anybody touching it.

A. That depends on the climate, the weather, the temperature, moisture, heat and the surface that it is on.

Q. You wouldn't be able to take a print then after a certain time?

A. No, sir.

Q. Would that print stay on this lamp?

A. The prints on the lamp had been crusted over; I imagine that was from the heat.

Q. How long after the crime was it when you made the prints?

A. I got to Mr. Stewart's house between four and five o'clock.

Q. In the afternoon?

A. We left there that night, and it was Saturday morning when I powdered the prints up and preserved them.

Q. Those prints that you said were Ed Brown's, are they the same on the burner and the lamp too?

A. I didn't go ahead and prepare those on the burner. The prints on the burner had been crusted over. It is the same as a greasy spot that will crust over and then finally dry up. That is the case there, and I imagine it was caused from the fire.

Q. Did you get any prints on the chisel or lock?

[fol. 115] A. No, sir, I didn't. There are some impressions on the lock; but the finger-prints of a man are very delicate and that lock is made of different little pieces put together. We have a process for leaving the prints just as they are, but I didn't do that.

Q. Do you know what that lock came off of?

A. No, sir.

Q. You didn't develop any prints from the chisel?

A. No, sir.

Q. You haven't had time to do that?

A. No, sir.

Q. Tell whether or not from your experience with lamps whether that is a good object for prints or not.

A. Yes, sir, that is good stuff there. Anything smooth is. Take when there is a little dust on a shoe box. you can see the print of your hand on that. When you put your hand on that, you pick up the top of the dust. And when you your hand on a smooth object, that leaves an impression of your hand.

Q. You would consider that an unusually good impression?

A. Fairly good. I expect there are fifty different prints on there cross-ways and every other way. I didn't pick out all of those. You have to pick out the furrows of each ridge there, and it takes time. If you cut one of the ridges while working with them, you are just out of luck because you can't put it back like it was.

Q. You say the records show that this is absolute testimony?

A. Yes, sir.

Q. There has never been an exception to that?

A. There is about one chance in two hundred and fifty million chances of getting two the same.

Q. You said something about not having a chance to develop these into larger prints?

A. We have a regular printing machine which makes little prints; it makes prints 2¾ inches by 3¼ inches. You [fol. 116] take that and put it in a camera making it larger, and then take that negative and put it in another camera and that makes it large enough so that you gentlemen can sit back there and see it.

Q. Is there anything incomplete about it now so far as you are concerned?

A. No, sir.

Q. You have completed your analysis of it?

A. I completed my part when I put those prints on there.

Q. You have reached your final conclusion?

A. Yes, sir.

Q. These specimens on the lamp, state whether or not they appeared to have been recently made.

A. They hadn't been on there long. There was a crust over each one of them caused by the heat. Either old age or heat will cause a crust on them.

Redirect examination.

By Mr. Stennis:

Q. Is that Ed Brown, the defendant, that you are talking about?

A. That negro there smoking a cigarette.

Q. That is one of the defendants here?

A. Yes, sir.

Mr. Clark: Now comes the defendant Ed Brown and moves the Court to exclude this testimony because it is incompetent, irrelevant and immaterial and uncertain.

The Court: Overruled.

(Witness dismissed.)

Mr. L. G. Temple, a witness for the State, in rebuttal, being duly sworn, testified as follows:

Direct examination.

By Mr. Stennis:

Q. Where do you live?

[fol. 117] A. Scooba.

Q. Did you know Mr. Raymond Stewart during his lifetime?

A. Yes, sir.

Q. Do you know the defendant Ed Brown?

A. Yes, sir.

Q. At any time fairly recently have you been to Mr. Stewart's house on any occasion that required him getting his keys?

A. Yes, sir.

Q. Tell about it.

A. I went to get some bolts to go in a cultivator; I went to his house and told him what I wanted. He said he didn't have the keys——

Mr. Clark: We object to what he said.

The Court: Sustained.

Q. What time of the day was this?
A. About 10:00 o'clock when I went over to his place.
Q. State whether or not he had to wait for the keys.
A. Yes, sir, about three or four minutes.
Q. Did he send for the keys or anything like that?
A. A fellow come along with them.
Q. Who was that?
A. Ed Brown.
Q. Tell whether or not he had Mr. Stewart's keys.
A. Yes, sir, he give them to him.
Q. Where did Ed Brown have them?
A. In his pocket.
Q. Did Mr. Stewart go and get the bolts for you then?
A. Yes, sir.
Q. Where did he go?
A. To his room, and he went to his safe and unlocked his safe and got the bolts out. They was in a little square box about that wide and about 10 inches long.
Q. Did he use the keys in getting to where the bolts were?
[fol. 118] A. Yes, sir.
Q. Did you notice whether or not he had any money in the safe?
A. Yes, sir, there was some money in the safe.

The Court: Was that an iron safe?
A. Yes, sir.

Cross-examination.

By Mr. Clark:

Q. When did that happen?
A. That was a little more than two years ago now.

Mr. Clark: We move to exclude that because it is incompetent, irrelevant and immaterial.
The Court: Overruled.

Redirect examination.

By Mr. Stennis:

Q. Was Ed Brown living on the place at that time?
A. Yes, sir.

(Witness dismissed.)

Mr. T. H. Nicholson, a witness for the State, in Rebuttal, testified as follows:

Direct examination.

By Mr. Stennis:

Q. You are the marshal of the town of Scooba?
A. Yes, sir.
Q. Do you know the defendant here, Henry Shields?
A. Yes, sir.
Q. On last Sunday morning down at Meridian, in company with Mr. Cliff Dial and Buddy Gilbert, did you have a conversation with this boy Henry Shields with regard to Mr. Stewart's death?

Mr. Clark: We object; this is not in rebuttal.
Mr. Stennis: It is in rebuttal of what Henry Shields testified about the conversation they carried on. This is about the first confession.
[fol. 119] The Court: I think it is competent.
Mr. Stennis: He testified at length what they told him.
The Court: With reference to the suggestions made to him?
Mr. Stennis: Yes, sir.
The Court: Overruled.

Q. Go ahead and tell the court and jury just how the boy Henry Shields was approached, what you said to him and what you did to him, if anything.
A. We went to the jail there and had this jumper and this axe that was found at Henry Shields' house; we asked to see him and they brought him down.

Mr. Clark: We want it noted that we are objecting to all this testimony.
The Court: Objection overruled.

A. They brought him in and we presented the stuff to him and told him it was evidence enough to convict him, but what we wanted out of him was to know whether there was anybody in it with him. He denied having seen the jumper, but he said the axe was his. We talked to him at length there about it, and he wouldn't admit knowing anything about it. Finally——
Q. At that time you hadn't talked to Ed Brown?

A. No, sir.

Q. And you hadn't talked to Yank Ellington?

A. No, sir. At that time we had no idea who could have been in it with him; in fact we thought that——

Mr. Clark: We object to that.

The Court: Sustained.

Q. You didn't have any information about anyone being in it definitely except for the axe?

A. That's all we had to go by at the time. We asked if we might take him in the back room there——

Mr. Clark: We object to that.

The Court: Sustained. Of course, it would be incompe-
[fol. 120] tent to admit any statements that he made. The only competent thing is to rebut the statement about suggestions made to him about who might be implicated.

Q. Without telling what he said, did he later talk to you gentlemen?

A. Yes, sir.

Q. Did he tell you some things about Mr. Stewart's death?

A. Yes, sir.

Q. Without saying what he told you, did you make any suggestions to him as to who was with him?

A. We merely asked him.

Q. Who did he say was with him?

Mr. Clark: We object.

The Court: Overruled.

A. Ed Brown and Yank Ellington.

Q. Did you suggest to him about who went in any certain door of the house?

Mr. Clark: We object to the leading.

The Court: Overruled.

Q. Did you or anyone else suggest that to him?

A. No, sir. We asked what door he entered through and he stated that he entered through the west door by the chimney.

Q. Don't tell what he said. At that time did you make any suggestion about anyone having picked Mr. Stewart's body up and carried it in that room?

A. No, sir.

Q. Was there any suggestion made to Shields about what weapons they used?

Mr. Clark: We object.
The Court: Overruled.

A. No, sir.
Q. You didn't know yourself, did you?
A. No, sir, we didn't know what they used.
Q. Did you later talk to Ed Brown on that same occasion?
[fol. 121] A. Yes, sir.
Q. About this killing?
A. Yes, sir.
Q. Did Ed Brown make any statements to you?
A. He did.
Q. Did you make any suggestions to Ed about the way that he entered or anything like that?
A. We merely asked to see if his story would chekc with Henry's.
Q. He answered your questions?
A. Yes, sir.
Q. Did you make any suggestions to Ed about the axe or anything like that?
A. There were no suggestions.
Q. About the foot axe or chisel or anything like that?
A. We mentioned the foot axe and chisel.

Mr. Clark: We object to that.
The Court: Overruled. I don't know what he was going to say.

A. I think we aksed Ed if he used either one; the foot axe had been missing. The axe was found there with blood on it, and we asked who used those things.
Q. Did you ask Ed anything about the jumper?
A. We asked Henry about the jumper in Ed's presence. Henry said the jumper belonged to Ed, and I asked Ed what about it, and he said: "Yes, sir, that is my jumper, but that negro had it on." He said that he put it on to keep from getting his jumper bloody.
Q. Yank Ellington wasn't there then?
A. No, sir.
Q. When you left those boys, Henry and Ed, did anybody tell them in your presence that they had to tell the same thing later?

A. Nothing was said about that.

Q. Did Mr. Dial make any statement like that?

A. No, sir.

[fol. 122] The Court: Ask if these were the first statements, so far as he knows, made by the defendants to anybody.

A. So far as I know, they were.

Q. The one Henry Shields made was the first one he made?

A. Yes, sir.

Q. Then the one Ed Brown made was the first that he made?

A. Yes, sir.

Cross-examination.

By Mr. Daws:

Q. Was that before or after the whipping?

A. That was after.

Q. Each of these three defendants had been beaten before the questions were propounded?

A. I don't know anything about Ellington. I hadn't seen him at that time.

Q. The defendants Ed Brown and Henry Shields had been whipped before the statements were obtained?

A. They had been whipped some, yes, sir.

Q. How long was that before they made these statements?

A. Well, at the time they made the statements there.

Q. They were whipped two or three times before any confessions were made at all?

A. No, they were only whipped once.

Q. That was in the jail in the city of Meridian, and you were present at that time? Who else was present there?

A. Cliff Dial and Guy Jack, Warren Campbell and myself when Henry was whipped; we four went in there, and Buddy Gilbert was in there when Ed was whipped.

Re-direct examination.

By Mr. Stennis:

Q. Is Mr. Campbell Warren the C*ah*ncery Clerk of Kemper County?

A. Yes, sir.

The Court: The objection is sustained to any statement [fol. 123] made at that time. The only purpose of this testimony and the only part that I admit is that these parties, witnesses and others, didn't suggest to these defendants at that time what they should say with regard to how it happened, nor whom they should implicate and further that they were not told to stick to this tale. That is in contradiction of the defendants.

Mr. Clark: We suggest that you tell the jury to disregard that part of the testimony.

The Court: Gentlemen, you will disregard any part of this testimony about the jumper and other such things except that they didn't suggest to them what weapons were used and who was implicated and didn't tell them to stick to this tale. The other is excluded.

(Witness dismissed.)

Mr. E. L. GILBERT, a witness for the State, in rebuttal, after being duly sworn, testified as follows:

Direct examination.

By Mr. Stennis:

Q. In company with Mr. T. H. Nicholson and Mr. Cliff Dial, did you see the defendant here, Henry Shields, in Meridian last Sunday?

A. Yes, sir.

Q. Did you have a conversation with him regarding the death of Mr. Raymond Stewart?

A. Yes, sir.

Q. I want you to tell what was said by you or the others present to this defendant, Henry Shields; in other words, did you make suggestions to him about who was connected with this killing?

A. We went in there and sent and got Henry Shields; they brought him down to the front room and we sat down there and asked him a few questions and told him that we knew he did it.

Mr. Clark: I understand the only purpose of this is to show they made no suggestions.

[fol. 124] A. We didn't make any suggestions. We accused him directly and showed him the axe and overalls and jumper.

Q. Did you have any information then about who had committed the crime?

Mr. Clark: We object to that.

The Court: I presume that he is going to say no.

A. No, sir, I did not.

Q. Did you at that time make any suggestions to him as to how this thing happened?

A. No, sir, not a thing.

Q. Did anybody else?

A. No, sir.

Q. Did you do so up until after he had made statements to you?

A. No, sir.

Q. After you talked to him there, did you or anyone else in your presence tell him that he must tell it the same way later?

A. I don't remember that. I will say "no" to that. We told him if he talked, that all we wanted was the truth, and if anybody else asked about it always tell that because that was the truth as he stated it.

Q. At that time were you inquiring as to whether anybody else was in it or not?

A. Yes, sir.

Q. Did he say anything about anybody else being in it?

A. Yes, sir.

Q. Did he name them?

A. He did.

Q. Who were they?

A. The Ellington negro and Ed Jones.

Q. Ed Jones?

A. Ed is his name.

Q. Is it Ed Brown?

A. Ed Brown.

[fol. 125] Q. What is the Ellington negro's given name?

A. He called him Yank, I think; his name is Arthur.

Q. Did you ask him to tell the truth?

A. I told him all we wanted was the truth.

Q. Did you tell him that if anybody else was connected with it, you wanted their names.

A. We wanted their names; we had no idea who they were.

Q. State whether he said that was all who were in it.

A. He said that was all. We questioned him three or four times and he said there was no one else.

Q. After you talked to Henry Shields, you talked to Ed Brown too?

A. We talked to him later.

Q. Did you make any suggestions to Ed with reference to entering the house or anything like that?

A. Yes, sir.

Q. You had already talked to Shields, then?

A. Yes, sir.

Q. Did you ask him about the lamp chimney?

A. Yes, sir.

Q. Had Shields been asked anything about how Mr. Stewart's body was placed in the seed room?

A. Yes, sir.

Q. Had he been asked anything about the jumper?

A. Yes, sir.

Q. Was Brown asked about the jumper too?

A. Yes, sir.

Q. Now, when you were talking to Shields before he had talked to you, did you make any suggestions to him about who used the death instruments or what instruments were used?

A. I asked him who used the axe, because we had that.

Q. Did you name any other instruments to him?

A. I don't think that we did; I did not.

Q. You had the axe there with you?

[fol. 126] A. Yes, sir. I had it in my hand when I was questioning him.

Cross-examination.

By Mr. Daws:

Q. Did you talk to Yank any?

A. No, sir.

Q. Ed Brown and Henry Shields had been whipped just before this happened?

A. I couldn't swear about Henry.

Q. Can you swear about Ed?

A. Yes, sir.

Q. You were not present if Henry was whipped?

A. I was there, but I wasn't where it was.

Q. Where the whipping was?

A. It sounded like whipping.

Q. They had Henry Shields in there?

A. Yes, sir, but I couldn't swear he was in there then.

Q. When you asked Ed after he was whipped and during the time he was being whipped, you asked him about whether or not he used the axe?

A. I asked him what he used.

Q. He told you what?

A. He told me he used the foot axe; I believed he described it as a mad-axe.

Q. You told him then when you left that if anyobody else asked him about it, he must always tell just what he told you all because that was the truth?

A. I didn't say that.

Q. I will ask the stenographer to read that question and answer to us. (Stenographer reads) That is the way I understood the answer, Mr. Gilbert. Now, how long did you all stay there?

A. We stayed there about an hour and a half, I imagine.

Q. How many times was Ed Brown whipped while you were there?

A. Well, he was whipped one time, but I don't know how [fol. 127] many intervals there were. We told him any time he wanted to talk, we would let him up, and he got up.

Q. There were two or three intermissions or skips between the whippings?

A. Yes, sir.

Q. Did you tell him that Henry had already told it?

A. Yes, sir.

Q. He finally admitted it himself?

A. Yes, sir; he told the same thing Henry told.

Q. He didn't tell that before he was whipped?

A. He told some before he was whipped.

Q. What did he say about it?

A. Do you want me to start at the first? He came downstairs and he didn't know that Henry had been whipped, I don't think, unless he heard it. We asked him some questions and told him we knew he was in it, that Henry had told the truth about it, and he said he didn't know anything about it. Then we let him in there where Henry was, and when he saw Henry he said: "That boy has lied on me; he done it." We asked why he knew that he did it, and he said he was passing by or come by there and saw him.

Q. Saw him at the house?
A. Yes, sir.
Q. Mr. Stewart's house?
A. Yes, sir. He said that the boy was lying on him.
Q. What did you tell Ed when you left with reference to telling anyone else?
A. I didn't have anything to say to Ed.
Q. Did anybody in your presence that you remember?
A. No, sir.

Redirect examination.

By Mr. Stennis:

Q. You say that was before Ed was whipped that he told you there in Shields' presence that Shields did it and that he saw him?
[fol. 128] A. Yes, sir. We further asked how he saw them, and he said that he come by close to the back steps or window as he came by the house. We asked him why he hadn't told that before, and he said they told him if he did, they would kill him and for him not to say a word about it.
Q. Who had told him that?
A. He said Henry, and I don't believe he had implicated Yank at that time, but that was before any whipping.

(Witness dismissed.)

Mr. Cliff Dial, a witness for the State, in rebuttal, after being duly sworn, testified as follows:

Direct examination.

By Mr. Stennis:

Q. After the death of Mr. Raymond Stewart did you endeavor to locate the perpetrators of this killing?
A. I did.
Q. On Friday night were you present when certain parties had the defendant Yank Ellington?
A. I was.
Q. Tell whether or not you took up for Yank and protected him.

A. I did. I told them that Mr. Stewart had asked me to take charge of the place, and I didn't want any of the negroes beat up and that I didn't believe this negro was guilty and I would rather they wouldn't beat him up.

Q. That was on Friday night?

A. Yes, sir.

Q. After you intervened, what became of Yank?

A. He went home, or I suppose he did. I got them to turn him loose.

Q. He went on off then?

A. Yes, sir.

[fol. 129] Q. I believe you arrested Ed Brown there the afternoon that the body was discovered?

A. Yes, sir; I did.

Q. You carried him to the Meridian jail?

A. I brought him to DeKalb.

Q. You later carried him to Meridian?

A. Yes, sir.

Q. Where did you find Henry Shields?

A. In Meridian.

Q. Do you know the name of the negro in whose house you found him?

A. Yes, sir; I found him at Ozie Carr's house.

Q. When was that?

A. Friday evening about 2:30 or 3:00 o'clock; we got in there around 11:00 or maybe 12:00 o'clock.

Q. Did you arrest him then?

A. Yes, sir.

Q. What, if anything, did he tell you about why he was down there, and what if anything did he say he had done to a negro by the name of Bob Cross?

A. He said first that he knocked his wife in the head with an axe and had shot Bob Cross.

Q. Do you know whether or not Bob Cross had been shot?

A. They say he hadn't.

Mr. Clark: We object to that.

The Court: Sustained.

Q. Have you seen Cross yourself?

A. No, sir.

Q. What did you do with Shields then?

A. We taken him to police headquarters and Mr. Harbour taken his finger-prints and then we carried him to jail.

Q. Sunday afternoon in company with Mr. Buddy Gilbert and Mr. T. H. Nicholson, did you see Shields and Brown in the jail in Meridian?

A. Yes, sir.

[ol. 130] Q. At the time you say Shields and Brown there, before you talked to Shields, did you know then who the perpetrators of the killing were?

A. No, sir; we thought we knewed Shields was guilty after we found the axe and jumper and after the way he done.

Q. Did you have the axe and jumper there with you?

A. Yes, sir.

Q. Did you have any knowledge of how it happened?

A. No, sir.

Q. In talking to Shields about it, did you make suggestions to him about how it happened?

A. No, sir. I told him myself he didn't have to tell it. I said: "We have got plenty of evidence on you to break your neck, but we want you to tell who was with you."

Q. Did you confront him with the axe and the jumper?

A. Yes, sir. He said it was his axe, but he denied owning the jumper. Later on he said it was Ed Brown's jumper and that he put it on to tote Mr. Raymond into the seed room where they threw him.

Q. That was Shields who said that?

A. Yes, sir.

Q. When you were talking to Shields there, did you suggest to him anything about what kind of weapons he used?

A. No, sir; we asked what he used to kill Mr. Stewart.

Q. Did he tell you?

A. Yes, sir. He said they used a mad-axe, a chisel, and that standard was in there. Somebody took that out of the house; it goes in a hay frame. It was put away out there, and somebody took it out.

Q. What about the foot-axe?

A. We never did find it. He said there was one used, but we didn't see it there anywhere.

Q. You couldn't find it?

[fol. 131] A. No, sir.

Q. Going back to the time that you talked to Shields, just tell whether or not you suggested to him—— I believe you asked him about the weapons; did you suggest anything about the lamp chimney to him?

A. Yes, we asked how come that lamp chimney was there, and I think Henry said one of them knocked the chimney off and it broke on the floor. It was broke all to pieces on the floor.

Q. After you talked to Henry, did you talk to Ed Brown?

A. Yes, sir.

Q. What did he say about it before there was any whipping?

A. He said he wasn't guilty,

Q. Were he and Henry together there when he said that?

A. Yes, sir. Henry kind of backed up from Ed and said: "Don't let Ed bother me." Ed kind of stepped up like he was going to hit him, and I said: "Get back; you can't bother that boy."

Q. Do you remember anything Brown said there before the whipping about whether or not Henry was guilty?

A. Yes, Ed said he come along there, he and his wife, that night from Fannie Little's, and that they seen them come out the back.

Q. Who was that?

A. Yank Ellington and Henry.

Q. Henry Shields?

A. Yes, sir.

Q. They told—he told you Henry Shields was there that night?

A. Yes, sir.

Q. Did any of you suggest to him anything about this foot-axe?

A. No, sir. We just asked what he knew about what they used to kill Mr. Stewart with.

Q. When you left there what did you say or anyone else in your presence say to any of them about telling it again?

A. We told them that if that was the truth to tell it, that all we wanted was the guilty parties and we didn't want an innocent man in this thing. We told them if it was [fol. 132] the truth to stick to it and if it wasn't we didn't want an innocent man.

Q. Did you ask them if anyone else was in it?

A. We asked who was there at the killing.

Q. Did you talk to Yank after that?

A. Yes, sir.

Q. You took him into custody, I believe?

A. Yes, sir.

Q. Where did you find him?
A. At old man Campbell's.
Q. What state was that in?
A. Alabama.
Q. When was it that you found him?
A. Monday morning.
Q. Where did you carry him?
A. To Meridian.
Q. On the way down there, did you strap him some?
A. Yes, sir. He denied it. He said that Ed and them were in it but that he stood around and held the light, and then he finally told what I thought was the truth about the thing.
Q. Did he say anything about holding the light before he was whipped?
A. Yes. He told them that night when they were after him that he seen Ed Brown kill him; that was Friday night.
Q. Yank told them that?
A. Yes, sir. He said he knew then it wouldn't do to tell all of it.
Q. When did you get to the Meridian jail with him?
A. About 2:00 o'clock, I reckon.
Q. You were not there Monday afternoon when Mr. Adcock talked to them?
A. No, sir.
Q. When you left Yank or before you left him, did you tell him that he had to tell it the same way again?
A. No, sir.
[fol. 133] Q. What did you say to him, if anything?
A. I don't remember if I told Yank anything about that; I told him all we wanted was the guilty man.
Q. After you talked to those two boys in Meridian Sunday morning or afternoon, you went and arrested Yank?
A. Monday morning, yes, sir.

Cross-examination.

By Mr. Clark:

Q. Now, when you went up there Friday night and befriended Yank, who had charge of him then?
A. A bunch of them was there; I expect it was 20 men.
Q. Were they whipping him?
A. It first started around the fire there. Sam Land and I went by the houses and told the negroes to come up there

and then went down to Dan Camp's and came back and they had Yank and Manny Brooks.

Q. Did they whip them in your presence?

A. Yes, sir.

Q. Did they hang him there?

A. Well, you know they didn't hang him. They pulled him up but they didn't hang him.

Q. Of course, they didn't kill him?

A. No, sir.

Q. How many times did they pull him up?

A. I didn't see them pull him up but one time.

Q. Did they whip him any after they pulled him up?

A. Yes, sir.

Q. When did you first offer your friendship to him?

A. I begged them before they started not to beat the negroes up.

Q. But they wouldn't listen to you?

A. No, sir.

Q. They whipped them a little anyhow?

A. Yes, sir.

[fol. 134] Q. A right smart?

A. Not too much for a negro; not as much as I would have done if it was left to me.

Q. They whipped him and hung him up there, and you asked them to let him loose?

A. Yes, sir.

Q. And he went on home then?

A. I suppose he did.

Q. He left there?

A. Yes, sir.

Q. What did you say he told them before he left there?

A. That he seen Ed Brown kill Mr. Stewart.

Q. Did anybody ask him if he seen Ed kill him?

A. Yes, sir, some of the boys did.

Q. They asked if he didn't see Ed kill him, and he said yes?

A. Yes, sir.

Q. That was after the whipping and after he was hung up there?

A. Yes, sir.

Q. He would have said that he did it if he had been asked?

A. I don't think so; I think he would have had better sense than that.

Q. When was the next time that you saw him?
A. Monday morning.
Q. You went down to the Meridian jail and saw Ed Brown and Henry Shields?
A. I didn't see Henry; I didn't see Ed Brown Monday, but I saw Henry.
Q. When did you first see Ed Brown?
A. Sunday was the next trip down there.
Q. Ed denied it at first, didn't he?
A. Yes, sir.
Q. He said that he wasn't guilty?
A. Yes, sir.
[fol. 135] Q. Shields denied it too?
A. Yes, sir, at first.
Q. What did you do to them then?
A. We kind of warmed them a little—not too much.
Q. They said then that they were guilty?
A. Yes, sir.
Q. But they didn't say it until after you warmed them up?
A. No, sir.
Q. Did they put Ellington into it?
A. Yes, sir.
Q. Did anybody ask them if Ellington was in it?
A. No, sir.
Q. They just voluntarily told that?
A. They just told who was in it; that was all we wanted to know.
Q. Do you remember asking if it wasn't a fact that Ellington used an axe on him?
A. He used an axe?
Q. I mean Shields. Did you ask Ed Brown that?
A. I think he made that in one of his confessions.
Q. You wouldn't be positive about that?
A. No, sir.
Q. Did anybody in your crowd ask if Ed used a foot-axe?
A. They claimed one of the boys said he had a mad-axe.
Q. You had missed that out of the wood box there?
A. Yes, sir.
Q. You knew that Mr. Stephens had one there?
A. Yes, sir.

Q. And some of you asked if Ed used it?

A. They said Ed carried it.

Q. Somebody in the crowd there suggested or asked him if Ed used the mad-axe?

A. I don't remember.

Q. Did anybody in the crowd suggest to him that Henry [fol. 136] Shields used an axe on him?

A. Yes—no, I don't remember Ed saying that Henry brought the axe with him.

Q. You don't know whether anybody asked Ed if he hit with the axe?

A. No, sir.

Q. You went back and arrested Yank on what you got from these parties in Meridian?

A. Yes, sir.

Q. From Ed Brown and Henry Shields?

A. Yes, sir, absolutely.

Q. Where was it you found Yank when you went after him?

A. Down in Alabama.

Q. How far was it from Mr. Stewart's place?

A. Three or four miles.

Q. What was he doing there?

A. Sitting down.

Q. You carried him on to Meridian?

A. Yes, sir.

Q. What did you say you did to him on the way to Meridian?

A. We stopped on the way and got water and stopped over there and talked to him about the thing, and then we strapped Yank a little bit.

Q. Did you tell him what the boys had told in Meridian?

A. Yes, sir.

Q. He said that was so?

A. Yes, sir.

Q. He admitted it himself after he had been strapped?

A. Yes, sir.

Q. He denied it up until then?

A. He said Ed was there.

Q. He denied Shields' part in it and he denied his own part. Now, I don't remember whether Mr. Stennis asked or not, but when you left the jail there Sunday, what did [fol. 137] you say, if anything or what did any of the

parties say to these defendants about telling the same thing afterwards?

A. I think you asked that a while ago and I answered it.

Q. I forgot what you said.

A. We told them we wanted the guilty parties, and if that was the truth that was all we wanted.

Mr. Clark: We move to exclude all of the testimony of this witness for the reasons heretofore given.

The Court: I exclude everything but the statement of this witness, if he did make such a statement, that he didn't lead this man in suggesting to him what weapons were used or who to implicate or to stick to the same talk. Everything that the boy told him is excluded.

(Witness dismissed.)

Dr. Wall, a witness for the State, in Rebuttal, being recalled, testified as follows:

Direct examination.

By Mr. Stennins:

Q. Doctor, this jumper that has been introduced here, did you see it and make an examination of it some time last week?

A. Sunday afternoon.

Q. Where was it then?

A. Up in the Mayor's office at Scooba.

Q. Did you examine the blood stains on that jumper last Sunday afternoon?

A. Yes, sir.

Q. Tell whether or not the blood stains were fresh then.

A. Yes, sir. I figured they wasn't over at least three days of four days; it couldn't have been longer than that.

Q. In your opinion, they couldn't have been over three or four days old at that time?

[fol. 138] A. Yes, sir, because at the time there were some clots here; that is just barely dried out now. When a garment that has blood stains on it is folded up or wadded up, the fluid part does not evaporate as fast as it would when hanging out like this. The water in blood in a normal person runs anywhere from 85 to 90 per cent and the rest of it is solid.

Q. If it was wadded up, it might last for several weeks then?

A. This showed moisture on it on Sunday afternoon.

Q. It showed signs of fresh blood?

A. Yes, sir.

Q. If it had been wadded up or folded up in a place for something like two months, what would have been the condition of the blood then?

A. The chances are in that length of time it would be dried pretty good, but all blood after it dries out takes on a rusty brown hue.

Q. It wouldn't have any color after that?

A. It has that now.

Q. It didn't have it Sunday afternoon?

A. Yes, sir.

Q. Did you notice at that time any saliva or anything like that on this coat?

A. Yes, sir; it was dried about like that now. That could be saliva or the discharge from a person't nose either.

Q. You made a rather thorough examination of this Sunday?

A. Yes, sir.

Q. You say the blood on it was not more than three or four days old then?

A. No, sir, it wasn't. There was moisture in the garment at that time.

Cross-examination.

By Mr. Clark:

Q. I believe you say that after a certain length of time [fol. 139] blood takes on a brownish hue.

A. Yes, sir.

Q. Well, how does that look to you?

A. That looks more like it was from iron.

Q. Blood turns to that color after it gets to a certain age?

A. Yes, sir, it turns to a rusty brown color.

Q. And that looks like it was from iron?

A. Yes, sir.

Q. That is the same color as blood after it has been on a garment for some time?

A. I don't know about that.

Q. That doesn't look so brown there, does it?

A. No, sir.

Q. You can't tell whether that is human blood or hog blood, can you?

A. No, sir.

Q. One man's opinion about blood is about as good as another's?

A. As to whether it is human or not?

Q. Yes, sir. That is true unless you use a microscope or something?

A. Yes, sir.

Q. This spot also is a brownish color?

A. I don't know how this has been folded up. This is fresh blood here. That evidently was wadded up so that the fluid couldn't evaporate.

Q. If it was kept that way three or four months, we will say, it would retain some of that fluid where the air couldn't get to it?

A. It would be dried out. Where it is clotted, that dark blot in a lump there, it would show up more than where the fluid was spread out. That is the best that I can tell you.

Redirect examination.

By Mr. Stennis:

Q. Doctor, you examined this garment that Sunday and saw that blood; now, in your opinion as a Doctor, is that [fol. 140] fresh blood or had it been in there seven or eight weeks wadded up?

A. No, sir, I shouldn't think it had; in fact, I know it hadn't been there that long.

Q. In your opinion, it hadn't been in there over three or four days?

A. Something like that. I have had a good deal of experience along that line.

(Witness dismissed.)

The State rests.

The end.

Reporter's certificate to foregoing transcript of testimony omitted in printing.

[fol. 141] [File endorsement omitted]

IN CIRCUIT COURT OF KEMPER COUNTY

INSTRUCTION FOR THE STATE—Filed April 6, 1934

No. 1

The Court instructs the Jury that Murder *id* the killing *od* a human being without authority of law and by any means and in any manner, when done with a deliberate design to effect the death of the person killed; and if the Jury believes from the evidence in this case, beyond a reasonable doubt, that the defendants, Ed Brown, Henry Shields and Yank Ellington, so killed the deceased, Raymond Stuart, then the Jury will find the defendants guilty of Murder.

Given.

[fol. 142] Instruction for the State

No. 2

The Court instructs the Jury for the State that Murder is the killing of a human being without authority of law by any means or in any manner, when done with the deliberate design to effect the death of the person killed. If the Jury believes from the evidence in this case beyond a reasonable doubt, that the defendant Ed Brown, and Yank Ellington so killed the deceased Raymond Stewart, and that the defendant Henry Shields was present, aiding, abetting and encouraging said killing as aforesaid, then the Jury will find the Defendants, Ed Brown, Henry Shields and Yank Ellington, guilty of Murder.

Given.

[fol. 143] Instruction for the State

No. 3

The Court charges the Jury for the State that a Criminal Conspiracy is an agreement of understanding planned and feloniously entered into by and between two or more persons whereby they confederate and agree to do an unlawful act, and the Jury *id* further charged for the State that a

criminal conspiracy may be proven by circumstantial evidence direct proof, or the acts and conduct of the alleged conspirators.

Given.

[fol. 144] Instruction for the State

No. 4

If you believe from the evidence beyond a reasonable doubt that the defendants Ed Brown, Henry Shields and Yank Ellington, unlawfully and feloniously conspired to kill the deceased Raymond Stuart, then each is responsible for the act or acts, if any, of the other, done in pursuance of said conspiracy and if you believe from the evidence beyond a reasonable doubt that in persuants of said conspiracy, if any there was, the defendants or either of them, willfully, unlawfully, feloniously and of malace aforethought, killed the deceased Raymond Stuart in any, manner, than all are guilty of Murder under the law and you should so state in your verdict.

Given.

[fol. 145] Instruction for the State

No. 5

The Court instructs the jury for the State that you do not have to return the same verdict as to all the defendants.

If the Jury believes from the evidence in this case beyond a reasonable doubt that the defendants Ed Brown, Henry Shields and Yank Ellington are guilty *thay* may return any of the following verdicts to-wit:

"We, the Jury find the defendant (or defendants naming them) guilty as charged in the Indictment," in which event it will be the duty of the Court to sentence the defendant (or defendants) to be hanged.

Or "We, the Jury, find the defendant (or defendants) guilty as charged in the Indictment and fix the punishment at life in the State Penitentiary," in which event it will be the duty of the Court to sentence the defendant (*of* defendants) to imprisonment in the State Penitentiary for life.

Or; "We, the Jury, find the defendant (or defendants) guilty as charged in the Indictment, but disagree as to the punishment," in which event it will be the duty of the Court to sentence the defendant (or defendants) to imprisonment in the State Penitentiary for life.

But if there is left in your mind a reasonable doubt growing out of the evidence, or for the *like* of evidence as to whether the Defendant Ed Brown, Henry Shields and Yank Ellington are guilty or not, your verdict as to such defendant or defendants about whose guilt you have a reason-
[fol. 146] able doubt from the evidence shall be:

"We, the Jury find the defendant (or defendants naming them) not Guilty."

Given,

[fol. 147] [File endorsement omitted]

IN CIRCUIT COURT OF KEMPER COUNTY

Instruction for Defendants—Filed April 6, 1934

No. 1

The Court charges the jury for the defendants that the fact that the three defendants are being tried under one indictment and one trial does not mean that you must return the same verdict as to all three. In other words, it is within your province and your province alone to determine the guilt or innocence of each of the defendants, you may, if you see fit, and if you believe from the evidence beyond all reasonable doubt that each of the defendants are guilty, return a verdict of guilty against each of the defendants, fixing the punishment as to each in the manner as set out in another instruction given in this case. Or, if there is a reasonable doubt in your mind from the evidence *of* lack as to the guilt of each of the defendants it will be your sworn duty to return a verdict of not guilty, as to each. Or, if you believe one of the defendants are guilty and as to the other two there is a reasonable doubt in your mind as to their guilt, you may return a verdict of guilty as to one who you believe beyond all reasonable doubts to be guilty, and it will be your sworn duty to return a verdict as to the other two. Or, if you believe

beyond all reasonable doubts from the evidence that there are two of the defendants guilty, and as to one there is a reasonable doubt in your mind as to his guilt, you may return a verdict of guilty as to two of the defendants, and it will be your sworn duty to return a verdict of not guilty as to the defendant about which there is a reasonable doubt as to his guilt.

[fol. 148] Further the Court charges you that it is within your province to fix a punishment of such defendant or defendants as you may believe beyond all reasonable doubts is guilty. You are not bound to fix the same punishment as to each defendant or defendants as you find guilty by your verdict. The punishment is left to your discretion and it is your province and your province alone to fix the punishment as to each of the defendants that you find guilty a separate instruction will be given by the Court touching the punishment that may be meted out, in event of a verdict of guilty.

The Court instructs you further that it will be your duty in considering your verdict as to the three defendants being tried, to consider the question of the guilt or innocence of each of the defendants separately. In other words, it is your duty not to pass on the guilt or innocence of all three at the same time, but it is your duty to single the defendants out, passing at one time on the guilt or innocence of the defendant Ed Brown, and at *onother* time of the guilt or innocence of the defendant Henry Shields, and at another time on the guilt or innocence of *of* the defendant Yank Ellington. The fact that the court has named the defendants in order as above, does not mean that you shall consider their guilt or innocence in the order as named above, but it is your province to determine which shall be considered first. And you are charged that you must consider their guilt or innocence separately, one at a time and not as a class.

The Court charges you further that in event you find either or all of the defendants guilty, then it is in your province to fix a punishment as to such defendant or defendants as you may find guilty. It is not incumbered upon you to fix the same punishment as to each but the manner of punishment of each defendant found guilty is left solely to your determination. You don't have to have any rea-

[fol. 149] son for making distinction as to punishment in

event that you find more than one guilty, but may, in the exercise of your own free will and judment, fix a punishment as to such defendant or defendants as found guilty, whether the punishment be common as to, each or to be different as to each.

Given.

[fol. 150] Instruction for the Defendants

No. 2

The Court instructs the Jury that in the final analysis you are the judges and not the Court of whether you shall consider the allege- confessions and you are instruc-ed if the evidence is such that you are uncertain as to whether such confessions were induced by threats *coercoin* or force and are not true *than* you are not to consider same and this is true even though you believe no force or threats or coercion was used to obtain all the confessions, but if you are uncertain as to whether or not such threats, forced, coercion were in the minds of the defendants as a result of the force formally used against them, and that the confessions are not true.

Given.

[fol. 151] Instruction for the Defendants

No. 3

The Court charges the Jury for the defendants an Indictment in this case is not evidence of guilt and you will not so consider it.

Given.

[fol. 152] Instruction for the Defendants

No. 4

The Court charges the Jury for the defendants, the burden is on the State of prove beyond every reasonable doubt to the satisfaction of the minds of each and every Juror, that the defendants are guilty as charged in the Indictment, and after considering all the evidence in the case,

or the lack of evidence, that there is a reasonable doubt in your minds as to the guilt of the defendants, then it will be your sworn duty to return a verdict of not guilty, and this is the law as to each of the defendants separately.

Given.

[fol. 153] Instruction for the Defendants

No. 5

The Court charges the Jury for the defendants, that under the law the defendants are presumed to be innocent of the crime charged in the indictment and every element thereof; that the presumption is not a mere legal technicality but is a substantial right that goes with the defendants at every stage of the trial, and rises up to combat the testimony of the witnesses which tend to prove the defendants guilty, and on this presumption alone it is your sworn duty to return a verdict of not guilty unless you believe beyond every reasonable doubt that the defendants are guilty, and this instruction applies to each of the defendants separately.

Given.

[fol. 154] Instruction for the Defendants

No. 6

The Court charges the jury for the defendants that you are the sole judges as to the weight of the testimony and credibility of the witnesses, and after consideration of the evidence in the case, that if you believe from the evidence that any witness has willfully, knowingly and corruptly sworn falsely to any material fact in the case then you may disregard the entire testimony of such witness, as you see fit.

Given.

[fol. 155] Instruction for the Defendants

No. 7

The Court charges the jury for the defendants, that before you may return a verdict in this case as to the three

defendants, all twelve of you must agree as to the guilt or innocence as to each of the three defendants separately. If after considering all the testimony in the case or the lack of testimony, there is a reasonable doubt in the mind of one or more Jurors as to the guilt of either or all of the defendants, then it will be the sworn duty of such juror or jurors after a full and free consultation with his fellow jurors, to vote for an acquital as to such defendant or defendants as to the guilt which they may be a reasonable doubt, even though such action may result in a hung jury or mistrial as to one, two or each of the defendants.

Given.

[fol. 156] Instruction for the Defendants

No. 8

The Court instructs the jury for the defendants that a confession solicited by threats or *coertion* or force intimidation is not legal evidence and if you have any reasonable doubt the so called confessions of the defendants resulted from threats, *coertion* force or intimidation and are not true then you are not to consider same as evidence against the defendants.

Given.

[fol. 157] Instruction for Defendants

No. 9

The Court instructs the jury for the defendants that all the testimony in regard to the finger prints and dying declarations should be subjected to the closest scrutiny by the jury and should be considered with great care and caution.

Refused.

[fol. 158] Instruction for the Defendants

No. 10

The Court instructs the jury that where it is once shown that force, threats or intimidation caused one to confess, it is the presumption of law that any confession made there-

after was results of threats, intimidation and it is the duty of the State to convince the Jury beyond every reasonable doubt and to every moral certainty that any later confessions were not the results of threats, force or *coertion* and if your minds as to this waver and are uncertain, it is your duty to reject any substantive that might have been made by the defendants and in passing on this question, you are to take into consideration the fact that the defendants are illiterate negroes and it is easy to obtain confession from such class of people.

Refused.

[fols. 159 & 160] IN CIRCUIT COURT OF KEMPER COUNTY

PETITION FOR APPEAL—Filed May 5, 1934

[Title omitted]

To Hon. H. C. Anderson, Clerk of said Court:

The undersigned Henry Shields, Ed Brown and Yank Ellington, respectfully represent unto you, at the March 1934 Term of said Court of said County, they were charged in a joint Indictment for the Murder of one Raymond Stewart, and was brought to trial at said term; that they plead Not Guilty and a trial resulted and the three being tried jointly under one Indictment and the result of said trial was guilty as charged. The trial Judge, thereupon, sentenced each of them to Death by hanging, and the date of the execution fixed as May the 11 1934.

They respectfully represent that they desire an appeal from said judgment and sentence to the Supreme Court of the State of Mississippi as provided in the Statute of the State of Mississippi.

Respectfully submitted, Henry Shields, Edd Brown, Yank Ellington, by Jno. A. Clark, Attorney, by D. P. Davis, Attorney.

[File endorsement omitted.]

[fol. 161] IN CIRCUIT COURT OF KEMPER COUNTY

[Title omitted]

PAUPER'S OATH—Filed May 7, 1934

Personally appeared before me the undersigned authority in and for Lauderdale County, Mississippi, Henry Shields, Ed Brown, and Yank Ellington, who being by me duly sworn to speak the truth, on oath say;

They say that they were convicted of the crime of Murder at the March 1934 Term of Circuit Court of Kemper County, Mississippi, and have taken an appeal to the Supreme Court of the State of Mississippi, in the manner as provided by law. They each severally say that they are unable to make an appeal bond, and unable to deposit a sufficient sum of money to cover cost, and this affidavit is made in order that they may have an appeal without giving bo*dn* for cost.

Arthur B. Ellington (Yank), Ed Brown, Henry (his X mark) Shields.

Sworn to and subscribed before me by Henry Shields, Ed Brown, and (Yank) Arthur B. Ellington on this the 5th day of May 1934. Willis M. Taylor, Circuit Clerk, Lauderdale County, Mississippi. (Seal.)

[File endorsement omitted.]

[fol. 162] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 163] SUPREME COURT OF MISSISSIPPI

ED BROWN, HENRY SHIELDS & YANK ELLINGTON, Appellants,

v.

THE STATE, Appellee

ASSIGNMENT OF ERRORS—Filed Nov. 3, 1934

Appellants assign the following errors, to-wit:

1st. The verdict rendered was contrary to and against the evidence as covered by the law and instructions of the

court, especially instructions number one and number two offered by the state.

2nd. The court erred in refusing instruction number nine and number ten offered by appellants.

3rd. The court erred in excluding testimony offered by appellants which was objected to by the state, especially in refusing to allow appellant Ed Brown, on page 47 of the record, to finish the statement which he had started to tell that deceased made to him on the afternoon prior to the killing that night.

4th. The court erred in permitting any testimony purporting to have been a confession of either of appellants. We especially refer to the testimony of J. H. Adcock, beginning on page 19; the testimony of Brice Stephens beginning on page 35; the testimony of Eugene Stephens beginning on page 39; the testimony of T. H. Nicholson beginning on page 110; the testimony of E. L. Gilbert beginning on page 115; the testimony of Cliff Dial beginning on page 120.

[fol. 164] 5th. The court erred in admitting the testimony of T. D. Harbour beginning on page 102, this being testimony touching finger prints.

[File endorsement omitted.]

[fol. 165] IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—Nov. 26, 1934

Argued by John A. Clark for the appellants and W. D. Conn, Jr., for the State; submitted on briefs of John A. Clark and D. P. Davis for the appellants and W. D. Conn Jr., for the State.

[fol. 166] IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

OPINION—Filed Jan. 7, 1935

In Banc: Cook, J.

The appellants, Ed Brown, Henry Shields, and Yank Ellington, were convicted of murder in the Circuit Court of

Kemper County and were sentenced to be hanged, and from this conviction and sentence this appeal was prosecuted.

Raymond Stewart lived alone in a small farm house in Kemper County. On Friday, March 30th, 1934, neighbors of the said Stewart discovered him lying unconscious in a side room of this house. In this room there was a pile of cotton seed near the body, and there was an open tool chest with blood on it in this room or an adjoining hall. Blood was also sprinkled on certain parts of the wall, and there was a large stick and parts of a lamp chimney and the bowl of a lamp, covered with blood, lying on the floor. Stewart died before a doctor arrived, and upon investigation it was found that his body had been brutally beaten and bruised. There was a severe wound on the shoulder which the doctor testified could have been made with an ordinary axe or heavy club, his collar bone was broken, his shoulder burst in two places, one arm was broken in several places, the skin was off his right cheek, the skull was fractured four or five times and punctured behind one ear; there was a bad cut in front of the left ear and the bones in the top of his head were crushed into small pieces. There was a perceptive odor of kerosene in the room, and a lamp wick with [fol. 167] both ends charred and burned. A Chisel and a large stick, called a wagon standard, which were found in the room were blood stained. At the time of the murderous assault on Mr. Stewart was committed, from which he died on March 30th, 1934, the circuit court of Kemper County was in session, and the appellants were indicted for the murder on April 4th, 1934, and were placed on trial on April 6th, 1934.

At the trial there was testimony to the effect that shortly after the homicide and investigation was made at the home of Henry Shields, one of the appellants, and a jumper with gray hairs and blood on the back of it was found in a bin of clothes, and partially concealed in a wood pile in the yard, there was found an axe with blood on it.

The sheriff of Kemper County was offered as a witness to testify as to confessions made in his presence by each of the appellants on the Monday night following the death of the deceased on Friday. When these confessions were first offered in evidence counsel for the appellants suggested that a preliminary examination as to their competency be conducted in the absence of the jury. Thereupon the jury

was excluded, and the witness was fully examined by counsel for the state and the defendants. The witness testified that he assured each of the defendants that he would protect them from harm from outside sources, that no threats of violence were made against them, no force or intimidation used, and no hope or promise of reward or inducements of any kind held out to them; that they were repeatedly admonished to tell only the truth, and that the statements were freely and voluntarily made. The Appellants cross-examined this witness but offered no evidence to contradict his testimony that the confessions were free and voluntary. On this cross examination it was developed that the sheriff had heard rumors that the appellants had been previously whipped and had confessed, and it was further developed that Henry Shields, one of the appellants, was limping when he came into the room where the confession was made, [fol. 168] and stated that he could not sit down for the reason that he had been strapped pretty hard. The sheriff further testified that he asked the appellants if they knew that under the law they might be hanged if they were found guilty, and they replied that they knew that fact.

Upon this testimony the trial judge ruled that the confessions were freely and voluntarily made and were admissible, and thereupon the witness testified that each of the appellants first confessed to him separately, and that they repeated the confessions in the presence of each other and in the presence of himself, the sheriff of Lauderdale County, Eugene Stevens, a Meridian minister, and several deputy sheriffs.

With the exception of a dispute between them as to who first entered the room where the deceased was sleeping and who struck the first blow, and some minor details, the statements of the three appellants, as detailed by this witness, were substantially the same. The confession of Henry Shields was substantially as follows: That he met the appellants, Brown and Ellington, in the afternoon before the killing, and they informed him that they were going to kill Mr. Stewart for the purpose of securing certain money which they claimed he owed them; that each offered him $12.00 to assist them, and he accepted the proposition; that it was agreed that they would meet at the home of Brown

about midnight following, which they did; that they then discussed the proposed killing and agreed upon a plan, and then went to the house of Mr. Stewart; that he and Ellington went to the west end of the house and entered through a door leading directly into the room where Stewart was sleeping, while Brown entered at the back of the house and waited with an axe which he secured from a tool box; that Ellington entered the room first and struck Mr. Stewart the first blow with a stick; that Stewart jumped up and made his way into the hall while they lighted a lamp and followed; that Ellington struck Stewart again in the hall, ans in the scuffle broke the lamp chimney, and that Ed Brown [fol. 169] then struck him with an axe, knocking him to the floor. He further stated that Ed Brown had the key to a safe in the house, and that after Stewart was knocked down in the hall Brown opened the safe and searched it for money, but found none; that he and Ellington carried Mr. Stewart into the cotton seed room and placed him on the seed; that Ed Brown then poured the oil from the lamp on the seed around the body and threw the lighted lamp wick down in an effort to burn him and the house, and they then left the premises, Shields denied throughout that he struck the deceased at all.

As detailed by the witness, Brown's statement of what occurred up to the time they entered the house was the same as that of Shields. Brown stated that he secured a foot axe from the foot chest and waited in the hall until Mr. Stewart came out of the bedroom; that Shields then hit him with an axe and he (Brown) hit him with the foot axe and knocked him down; that Shields and Ellington then carried the body into the seed room, and Shields poured the oil on the seed and attempted to set them on fire. He further stated that he threw the foot axe in a cistern or well in the yard, but this axe was not found. Both Brown and Ellington stated that Shields carried an axe to the house and into the deceased's bedroom, and both stated that he struck the deceased with the axe in the hall, while Ellington stated that Shields struck the first blow with the axe when they entered the room where the deceased was sleeping. Ellington denied striking the deceased in the bedroom, but stated that he did strike him one or two blows with a chisel after he got out near the tool chest in the hall. Both Ellington and Shields stated that Brown was a tenant

on Mr. Stewart's farm, worked around the house and fed the livestock, and frequently carried a bunch of keys belonging to Mr. Stewart. Their statements covered other details in reference to an exchange of jumpers and incidental matters, which we will not here set forth. The Sheriff of Lauderdale County and Eugene Stevens, a minister, also testified as to the confessions of the appellants, and their version of the circumstances under which the confessions [fol. 170] were made, and the statements of each of the appellants, was substantially the same as of Sheriff Adcock.

With the admission of these confessions the state closed its case, and thereupon each of the appellants took the stand and testified to facts tending to establish an alibi, and also offered their wives and one other person as a witness to establish the alibi. They admitted that they made the confessions which had been offered in evidence, but testified that prior to the time they confessed to the two sheriffs in the Lauderdale County jail they had been seriously whipped and otherwise mistreated by other parties, and had thereby been induced to confess to these parties, who warned them that they must thereafter continue to tell the same story, and that they made the subsequent confessions on account of fear of further violence. They explained their ability to construct their story and tell the part each one took, upon the ground that they followed questions and suggestions of the parties who forced the confessions from them. They admitted that Sheriff Adcock and his associates treated them kindly and promised to protect them from harm, and that the sheriff told them they did not have to talk, and that if they made any statement they should tell only the truth about it. Two of them also admitted that during the progress of the trial, and just a short while before they took the witness stand, they had voluntarily told Sheriff Adcock that the confesssions they had made to him on the previous Monday night were true.

After the three defendants had each testified, the state requested permission to reopen its case and introduce a finger print expert who had not been available at the time the state's evidence in chief had been presented. Over the objections of appellants the court permitted this witness to testify, but offered the appellants a reasonable time to secure evidence in rebuttal. They offered no such evidence and made no requests to postpone or delay the trial until

[fol. 171] such evidence could be obtained. This witness testified that he had developed certain finger prints which were on the bowl of the lamp found near the body of the deceased, and had compared them with the appellant Brown's finger prints and they were the same.

In rebuttal three witnesses were offered for the purpose of contradicting the appellants, who had testified that when they made their first statements about the killing, many of the answers given by them were suggested by parties present; and in the course of the examination of these witnesses, it was developed that before the appellants made the first statements they had been whipped. They also testified to various statements made by the appellants when they first confessed, which were inadmissible, but upon motion of the appellants all the testimony of these witnesses was excluded, except that to the effect that they made no suggestions to appellants as to the statements to be made by them, or the answers to be given to questions asked them, and upon the suggestion of counsel for appellants the court directed the jury to disrgeard all the testimony of these witnesses except that part with reference to suggestions made to the appellants. No other request in reference to the testimony of these witnesses was made of the court.

The principal assignment of error urged by appellants is that the confessions were inadmissible and should have been excluded by the court. As herein previously stated, when the confessions of the appellants were first offered, the court conducted a preliminary examination to determine their competency and admissibility. At this examination the appellants cross-examined the state witness but offered no evidence whatever to contradict the witness or otherwise show that the confessions were not free and voluntary. Upon the evidence offered the court held, and we think correctly, that the confessions were shown to have been freely and voluntarily given. In the introduction of their proof, on the merits, and in the introduction of the state's rebuttal evidence there was testimony which strongly tended to show that the confessions were made under the influence [fol. 172] of fear induced by threats and violence, but no motion was made to exclude the confessions. After the court ruled that the confessions were admissible it was never thereafter called upon to pass upon their competency, and as held in the case of Loftin vs. State, 150 Miss. 228,

116 So. 435, wherein identically the same circumstances and situation were presented, "the court committed no error in not excluding them in the absence of a request so to do". In the Loftin case, supra, the court quoted, considered and approved the rule announced in Ellis vs. State, 65 Miss. 3 So. 188, 7 Am. St. Rep. 634, that "after a confession has been admitted by the court, either party has a right to produce before the jury the same evidence which was submitted to the court when it was called upon to decide the question of competency, and all other facts and circumstances relevant to the confession, or affecting its weight or credit as evidence; and if it should be made to appear at this point, or any other, during the progress of the trial, that the confession was made under such circumstances as to render it incompetent as evidence, it should be excluded by the court". But it was expressly held that if a confession has been properly admitted in evidence after a preliminary examination as to its competency, no error is committed by a failure to exclude it, in the absence of a request so to do, although during the later progress of the trial it is made to appear that the confession was made under such circumstances as to render it incompetent as evidence. The Loftin Case is applicable and controlling here, and in the absence of error on the part of the lower court in failing to exclude the confessions we cannot reverse upon that point.

The appellants next assign as error the action of the court in permitting the introduction of a finger print expert as a witness after the state had closed its case in chief, and the appellants had begun the introduction of their testimony. The record shows that the testimony of this expert was not available when the state closed its case, and it was [fol. 173] admitted with the definite understanding that the appellants would be granted a reasonable time within which to obtain witnesses to meet the testimony to be offered by this witness. The appellants made no request to postpone or continue the trial until evidence bearing upon the finger prints could be obtained, if any were available. The reopening of a case to admit further testimony is a matter that is addressed to the sound discretion of the trial court, and its action in so doing will not be reviewed in the absence of a showing of abuse of that discretion. Baired vs. State, 146

Miss. 547, 112 So. 705; Morris vs. State, 148 Miss. 680, 114 So. 750.

The appellants next complain of the testimony of certain rebuttal witnesses which had reference to confessions made to them as a result of alleged whippings administered to the appellants. The court sustained appellant's motion to exclude this testimony and instructed the jury to disregard it. No motion for a new trial was made after the motion to exclude was sustained. The court granted every request made of it in reference to this testimony, and therefore it cannot be held to have committed error.

Appellants next complain that instructions No. 1 and 2 for the state do not correctly define murder, for the reason that the words "with malice aforethought" are omitted therefrom. Both of these instructions define murder as being the killing of a human being, without authority of law, by any means or in any manner, when done with the deliberate design to effect death of the person killed. This definition of murder is in the exact language of the statutory definition found in Section 985, Code of 1930, and is correct. Atkinson vs. State, 137 Miss. 42, 101 So. 490.

Appellants next complain of the refusal of two instructions requested by them, Nos. 9 and 10. Instruction No. 9 was a cautionary instruction in reference to the effect of testimony concerning finger prints and dying declarations, and no error was committed in refusing it, first, for the rea- [fol. 174] son that dying declarations were in no way involved, and second, the giving of cautionary instructions is a matter addressed to the discretion of the trial judge, and the refusal of such an instruction is not reversible error. Watkins vs. State, 134 Miss. 211, 98 So. 537.

Instruction No. 10, which was refused by the court, was properly refused for the reason that it was a charge on the weight to be given the evidence. There is no merit in any of the other assignments of error.

The judgment of the court below will therefore be affirmed, and Friday, February 8th, 1935, is set as the date for the execution of the sentence.

Affirmed.

[File endorsement omitted.]

[fol. 175] IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

In Banc: Anderson J., Dissenting

Stewart was murdered on the 30th day of March, 1934. The March term of the Circuit Court of Kemper County was then in session. Appellants were indicted for the murder on the 5th day thereafter—the 4th of April—and the trial began and ended on the 6th day of April—the second day after the indictment. Appellants were without counsel. The court appointed John A. Clark, L. P. Spinks, J. H. Daws and D. P. Davis, members of the Kemper County bar to defend them. It is stated in the briefs that Mr. Spinks was sick and unable to attend the trial, Mr. Daws, for reasons of his own, refused to join in this appeal, leaving Messrs. Davis and Clark. It is not shown whether these four were the only members of the Kemper County bar or not.

Leaving out the confessions, the evidence was wholly insufficient to sustain the conviction. The evidence showed without any substantial conflict that the appellants were driven to confess their guilt by most brutal and unmerciful whippings and beatings at the hands of persons who doubtless thought they were guilty. A large part of this character of evidence was not specifically objected to by counsel representing appellants. The majority opinion holds that for that reason its competency cannot be raised on appeal. [fol. 176]. The first witness for the state testifying to the confessions was the sheriff of the county, Adcock. He testified that the confessions took place in jail and were free and voluntary, but stated that while one of appellants was confessing another one came in who had been so badly whipped and beaten that he was unable to sit down. The other appellants saw his condition. The evidence of Adcock was objected to by appellants and the objection overruled. Whether a confession is free and voluntary is a question for the court, but before the court is justified in admitting the confession it must be shown beyond a reasonable doubt and to a moral certainty to have been free and voluntary. Ellis vs. State, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634; Williams vs. State, 72 Miss. 117, 16 So. 296; State vs. Smith, 72 Miss. 420, 18 So. 482; Johnson vs. State, 107 Miss. 196, 65 So. 218, 51 L. R. A. (NS) 1183; Fisher vs. State, 145

Miss. 116, 110 So. 361. Adcock's testimony failed to meet that requirement.

Other evidence showed and, as stated, without any material conflict that all the confessions made to the sheriff and other witnesses were forced by brutal whippings and beatings. As also stated, these confessions went in without objection by appellants' counsel. It is doubtful whether any further objection was necessary after the testimony of Adcock was objected to. It appears that that was enough to give the court to understand that all confessions were objected to on the same ground. But, if wrong about that, should the general rule laid down in the controlling opinion govern in this case? It is a common saying that there are exceptions to all rules. If that be true, this is one case that ought to come within the exception. Wipe out these confessions, and the court would have been forced to direct a verdict of not guilty. The court had staring it in the face this incompetent testimony without which there could be no conviction. Must the lives of the appellants be taken by law because their counsel failed to bring to the attention [fol. 177] of the court this incompetent evidence? Are they without remedy? To illustrate: A is indicted for the murder of B; the evidence is sufficient to show the murder by somone, but the only evidence that A was the criminal agent is purely opinion testimony; witnesses testify that in their opinion A is the guilty agent; A's counsel does not object to the testimony; there is a conviction; A is sentenced to be hanged and appeals to the supreme court; must he suffer death because of the failure of his counsel to object to the testimony on the ground of incompetency?

Viewing this trial as a whole, it appears to me that it is condemned by the principles laid down by the Supreme Court of the United States in the Scottsboro cases. Powell vs. Alabama, 287 U.S. 45-77, 77 L. Ed. 158. Appellants were denied due process—a fair and impartial trial. They were represented by counsel who had neither time nor opportunity to do their part. Due process requires representation by counsel, either employed by the accused or appointed by the court. The court so held in the Alabama cases, and further that the right was denied where on being arraigned the accused was not asked whether he had or was able to employ counsel or wished to have counsel appointed, or whether he had friends or relatives who might assist in that

regard if communicated with; that due process required a fair, orderly and deliberate trial.

The case in a few words is this: The murder one day. Appellants indicted the 5th day thereafter. The second day after the indictment they were tried and convicted on confessions of guilt whipped and beaten out of them. Four members of the bar had been appointed to defend them, one failed to act at the trial and one failed to join in the appeal. Those acting failed to object to the major part of the evidence of confessions. Without the confessions the evidence [fol. 178] was wholly insufficient to convict.

In some quarters there appears to be very little regard for that provision of the bill of rights guaranteeing persons charged with crime from being forced to give evidence against themselves (Section 26 of the Constitution). The pincers, the rack, the hose, the third degree, or their equivalent, are still in use.

[fol. 179] IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

JUDGMENT—Jan. 7, 1935

This cause having been submitted at a former day of this term on the record herein from the Circuit Court of Kemper County and this court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 6th day of April 1934, be and the same is hereby affirmed. It is further ordered and adjudged that the appellants, Ed Brown, Henry Shields and Yank Ellington, for their crime of murder, be safely kept in jail of Kemper County until Friday, February 8th, 1935 and on that day between the hours of 10 o'clock A. M. and 4 o'clock P. M. within the jail yard of Kemper County or at such other convenient place as the Board of Supervisors of Kemper County may designate, they the said Ed Brown, Henry Shields and Yank Ellington, be by the Sheriff of Kemper County, hanged by their necks until they are dead. It is further ordered and adjudged that the County of Kemper do pay the costs of this appeal to be taxed, etc.

[fol. 180] IN SUPREME COURT OF THE STATE OF MISSISSIPPI

[Title omitted]

MOTION FOR EXTENSION OF TIME IN WHICH TO FILE SUGGESTION OF ERROR—Filed Jan. 15, 1935

Come appellants in the above styled cause, by their attorneys, and move the Court to grant an extension of fifteen days in which to file a Suggestion of Error, in said cause, in the Supreme Court of the State of Mississippi on the following grounds, to-wit:

That counsel for appellants is, at the present time, ill, and wholly unable to prepare and file said Suggestion of Error, on behalf of appellants, in the above styled cause.

That appellants are under sentence of death and for this reason alone are entitled to have ample time allowed to their counsel, for the preparation and filing of a Suggestion of Error in this cause, same being their last opportunity of appeal to this Honorable Court.

Signed: John A. Clark, Attorney for Appellants, by Brewer & Hewitt. Signed: Approved, Sydney Smith.

[File endorsement omitted.]

[fol. 181] Ordered: 15 days additional time granted within which to file suggestion of error.

[fol. 182] IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

[Title omitted]

SUGGESTION OF ERROR

Now come the appellants, by their attorneys, and respectfully suggest to the Court that in the above matter, and its decision, the Court was in error:

I

In affirming the judgment of the trial court in that the preliminary examination of Sheriff Adcock, conducted by

the trial court, developed sufficient facts to show that testimony with reference to the confessions made to Adcock, et al, was inadmissible, on the ground that said confessions were not free and voluntary; and the admission of said testimony amounted to a denial of appellants' Constitutional rights, under the Constitution of the State of Mississippi, and to a denial of due process of law to appellants, within the meaning of the Fourteenth Amendment to the Federal Constitution.

II

In affirming the judgment of the trial court, in that the trial court, of its own motion, should have excluded the evi- [fol. 183] dence as to confessions, after testimony was introduced by appellants, and it was admitted by witnesses for the State, that said confessions were obtained by force and violence; and said failure of the trial court amounted to a denial of a fair and impartial trial, as guaranteed by the Constitution of the State of Mississippi; and to a denial of due process of law, as guaranteed by the Fourteenth Amendment to the Federal Constitution.

III

In affirming the judgment of the trial court, in that appellants were denied a fair and impartial trial, under the Constitution of the State of Mississippi, and were denied due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, in that evidence, as to confessions, obtained by torture, was admitted on behalf of the State, in rebuttal, and later excluded by the Court, but said testimony having been heard by the jury, could not be so excluded as to cure the reversible error.

IV

This Court erred in its decision, and judgment entered by it in the above styled cause, in that the State of Mississippi contrived the conviction of appellants, in the lower court, by the knowing use, by prosecuting authorities of the State, as confessions, of statements illegally obtained from appellants, through force and violence; such use by the State amounting to a denial of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

[fol. 184]

V

This Court erred in its decision, and judgment entered by it in the above styled cause, in that the State of Mississippi contrived the conviction of appellants, in the lower court, through the introduction of illegal and incompetent evidence, under the guise of confessions, same being statements extorted from appellants by officers and agents of the State, through force and violence; such action denying to appellants due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

VI

This Court erred in affirming the judgment of the trial court, in that the trial court had lost jurisdiction to enter said judgment, because of the denial of due process of law, as guaranteed by the Fourteenth Amendment to the Federal Constitution, to appellants in the trial of said cause.

VII

This Court erred in affirming the judgment of the lower court, because appellants were denied a hearing in the trial court, within the meaning of the due process clause of the Fourteenth Amendment to the Federal Constitution, in that the trial of appellants was a mere pretence, the validity of same being destroyed by the fraud of the State, through its officers and agents.

VIII

This Court erred in affirming the judgment of the lower court, in that appellants were denied representation by [fol. 185] counsel, in the trial court, as provided by the Constitution and laws of the State of Mississippi, and within the meaning of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

IX

This Court erred in affirming the judgment of the lower court, in that the indictment was received, and the case tried at a time when the court had lost the power so to do.

X

This Court erred in affirming the judgment of the lower court, in that the record shows that appellants were tried

before the indictment was returned, or the homicide committed.

XI

This Court erred in affirming the judgment of the lower court, in that the name of the foreman of the grand jury was not endorsed on the indictment as required by law.

XII

This Court erred in affirming the judgment of the lower court in that the record does not disclose that the grand jurors, who returned the indictment, or that the petiti jurors, who tried the case, were sworn.

Respectfully submitted, (Signed) Brewer & Hewitt, Attorneys for Appellant.

Copy received.

(Signed) Greek L. Rice, Attorney General of the State of Mississippi, by W. D. Conn, Jr., Asst. Atty. General, Feb. 6, 1935.

[fol. 186]

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

[Title omitted]

MOTION IN ARREST OF JUDGMENT AND FOR NEW TRIAL—Filed Feb. 5, 1935

Comes the appellants, Ed Brown, Henry Shields and Yank Ellington, and moves this Court to arrest the judgment in this cause wherein this case was affirmed by this Court on January 7, 1935, and each of said appellants sentenced to be hanged and charges the facts to be:

That all the evidence of alleged guilt shown against them was brought about by threat, coercion and brutality and because this was known to the Court and District Attorney when they were convicted in the lower court, and that this coercion and threats was continued and carried on up to and through their trial and that they were so intimidated that they could not have a fair trial;

That they were denied the benefit of counsel in their cause or an opportunity to confer with their witnesses owing to the manner in which the trial was conducted and the restraint under which the defendants were held from the time of their a-rest until after their conviction and that they were

denied opportunity to confer with their counsel in an orderly and reasonable manner and that they were denied any [fol. 187] opportunity to make a motion for a new trial and that this trial amounted to depriving them of their life without due process of law under the Constitution of the United States;

They charge the facts to be that Mr. Raymond Stewart was said to have been killed in Kemper County, Mississippi, on the 29th day of March, 1934, and that each of these appellants were totally innocent of the commission of such crime or any participation therein or any knowledge of how Mr. Stewart's death was brought about; and charge the facts to be that Yank Ellington, one of the appellants, was notified at his home on the night of the 29th day of March, 1934, to come with Nannie Brooks, his mother-in-law, up to a spot near the home where Mr. Stewart was said to have been killed; that when they arrived at the place, there was a large number of white people present and they were immediately accused of the crime; that they were then and there by a mob lead by Mr. Cliff Dial, the Deputy Sheriff, and hanged up by the neck to the limb of a tree in order to coerce a confession from them that they did the killing or knew something about it. After twice hanging them by the necks and being unable to extort a confession from them that they tied them up to trees and gave them a terrible lashing on their bare backs and after being terribly shipped and having steadfastly refused to make any confession of guilt, they were released and that afterwards a day or two later, the appellant Yank Ellington was arrested and carried to jail in Meridian in Lauderdale County, Mississippi by Mr. Cliff Dial, Deputy Sheriff of Kemper County, and that on the way, he stopped, under the pretext of getting some water, took this defendant out of the car and while shackled had his clothing removed and gave him another terrible beating with a leather strap with buckles on it; and after [fol. 188] thoroughly lacerating his body, compelled him to make some statement about it, the contents of which is unknown to the appellant, Yank Ellington, because he had been beat into such insensibility as to be practically in a stupor;

That then he was carried to the jail in Meridian, Mississippi, and there confined with Henry Shields and Ed Brown;

That Ed Brown and Henry Shields had both been arrested by Mr. Cliff Dial, Deputy Sheriff as aforesaid, and carried to the jail;

That on Sunday night, the first day of April, 1934, Mr. Cliff Dial, in company with other men, came into the jail and caused these appellants to be brought out into a room where they were stripped and told that they must confess the killing of Mr. Stewart; and they were severely whipped until they were compelled to make a statement or be whipped to death; and they thereupon made such statement as he requested them to make; and that their bodies were covered with sores and stripes; that Yank Ellington's neck had a ring around it from the rope with which he had been hanged and that they were brought before the Court at Dekalb in Kemper County, on the afternoon of April 4th, without having had any opportunity to confer with their families or kins-people and without any opportunity to employ counsel or see if it was possible for their families or relatives to employ counsel, and that they were arraigned on the indictments and that Mr. Cliff Dial, the Deputy Sheriff who had told them when he whipped them that if they denied their guilt, he would whip them to death, was standing within a few feet of them at the time they were arraigned and in charge of them as executive officer; that he was looking them in the face and that they were afraid then even to admit that they were innocent, and afraid to ask for a [fol. 189] lawyer or that the Court appoint one; The court then asked them if they wanted a lawyer and they replied that they didn't suppose it would do any good;

That the Court then said he would appoint them two lawyers, one Mr. John Clark, the other whose name they do not remember, and appellants say they were immediately taken from the court room by the officers and carried quickly back to Meridian jail, thirty miles or more from Dekalb;

That next morning they were brought back to Dekalb from the Meridian jail and taken into the Court House and that Mr. Clark arose and asked the Court for permission to have a consultation with your appellants; that the Court ordered the Sheriff to take them into a room in the Court House and allow them to confer with their counsel; that the court then added two more lawyers to their counsel, the names of whom they do not remember and these attorneys were not interested in their defense and they have since learned were not in sympathy with them but had expressed their opinions as to their guilt and desired their conviction; that Mr. Cliff Dial attempted to accompany the de-

fendants in this conference but upon the objection of Mr. Clark, he was told to remain out of the room; that he stood just outside the door and that they could observe him through the glass in the door, and he would hold his ear down close to the keyhole so as to observe what they were saying and this was immediately noticed by them; that they were afraid to say anything or assert their innocence for fear that they would be whipped by Mr. Dial; that during the hour of this conference in which they were only able to whisper to their counsel that they were innocent and without any opportunity to confer openly with counsel; and three or more times while they were in the room, the Judge sent a messenger to the room stating that he did not want to unduly hurry them but to get through as quick as they could as he was anxious to go on with the trial;

That they went out in the court room after the third [fol. 190] or fourth attempt of the Court to hurry them in this way and went to trial; and along in the late afternoon or evening, the court said he would take a recess until tomorrow morning which would be the 6th day of April, 1934; and immediately your appellants were handcuffed, carried out and placed in the conveyance and returned to Meridian jail; and that the next morning, April 6th, 1934, they were brought back to the Court House in Dekalb and immediately the trial began and lasted until dark, when the jury returned the verdict against all three of your appellants, convicting them of murder; they were immediately asked to stand up by the Court and on motion of the District Attorney, the court as soon as he could consult a calendar as to dates, immediately sentenced them to be hanged and set the date for their execution; that they were immediately handcuffed, carried out and put in the conveyance and returned to Meridian with no opporunity to consult their consel and no opportunity to consult with their families and no opportunity to make a motion for a new trial, and without having been informed that they had a right to make a motion for a new trial; that no time was given them in the beginning of the trial to have a jury drawn from a special venire; in fact, they were not advised that they were entitled to any such right;

That at the time and during their trial, Mr. Cliff Dial and others who were present when they were whipped were introduced as witnesses and told of their confession before the court and jury and admitted that they made no confes-

sion until they were whipped and that the confessions were made during the time they were being whipped;

And they plead that said trial was not such a trial as is provided for by the Constitution and Laws of Mississippi or with the Constitution of the United States, and they plead that they are being deprived of their lives without [fol. 191] due process of law as provided for in the Constitution of the United States.

And they pray the judgment of this Court as to whether or not such judgment obtained in this way by coercion and threats and by failure to have an opportunity to see if they could employ counsel or their families could employ counsel for them that was in sympathy with them and because they were denied the benefit of counsel or any reasonable opportunity to confer with counsel appointed for them; and they pray that this the Court of last resort in Mississippi arrest this judgment because rendered in violation of their rights and denies them life without due process of law;

They plead that they are innocent of any crime charged against them and that this plea is not filed for delay but that justice may be done and they tender as evidence in support of their plea the affidavit of their Attorney, who was appointed by the Court, Mr. John Clark, and the affidavits of the appellants, and ask this Court to consider same;

And pray this Court not to condemn them to death on this judgment without giving them an opportunity to be heard before the Court in a trial where they are represented by counsel with reasonable opportunity to confer with them about that trial and with their witnesses.

(Signed) Earl Brewer, and W. H. Hewitt, Attorneys for Appellants. Ed X Brown. Henry X Shields. Yank X Ellington.
his mark his mark his mark

[fol. 192] *Duly sworn to by Ed Brown and others. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 193]

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

[Title Omitted]

AFFIDAVIT OF JOHN A. CLARK—Filed Feb. 5, 1935

Personally appeared before me, the undersigned authority authorized to administer oaths under the laws of the state of Mississippi, John A. Clark, of DeKalb, Mississippi who says upon oath that on or about the 29th day of March, 1934, Mr. Stewart was found in a dying condition at his home, and shortly thereafter, during the 29th day of March, 1934, died; and that the next week, or to be exact, on the 4th day of April, 1934, which was on Wednesday of the week, a grand jury was called together, returned a bill of indictment against the three defendants Ed. Brown, Henry Shields and Yank Ellington, and the negroes were confined in jail at the time in Meridian, Mississippi, which is in Lauderdale county, some thirty miles from DeKalb, the county seat of Kemper county. That each of the three parties charged in the indictment of murder for the killing of Mr. Stewart were ignorant, pauper negroes. That they were brought over from Meridian on the 4th day of April, in the afternoon, and brought into the court house, and they were arraigned on the bill of indictment, and one of them, speaking for the trio, said: "We just as well plead guilty." There was present standing near the defendants Mr. Cliff Dial, a deputy sheriff. The court then told the defendants [fol. 194] that they were to be tried, and asked them if they wanted a lawyer, and they said they didn't suppose it would be any use to have one. Thereupon the court said "I will appoint Mr. Spinks and Mr. Clark to defend you", and said the case would be called for trial tomorrow morning. Thereupon the three defendants were taken immediately from the court room and into an adjoining room for about a 30 or 40 minute conference with said attys then carried back to Meridian, Mississippi. The next morning about nine or ten o'clock the defendants were brought into the court room again by the officers of the law, and the two parties appointed to defend them requested a conference with the defendants, and they were sent into a room in the court house for this conference along with the deputy sheriffs guarding them, and Mr. Cliff Dial started to come into the room where they were undertaking to

confer with their counsel, and thereupon objection was made to him coming into the room beause of certain matters which will hereafter be referred to. That within a short while, not exceeding thirty or forty minutes, a messenger was sent into the room by the court with the statement made to us that the court does not want to unduly hurry you gentlemen in your conference with the defendants, but to get through as quickly as you can, as the court desires to proceed with the trial, and in the course of an hour or two spent in the conference the court sent two or three times with this message to the defendants' counsel in order to hurry them up with the conference.

When Mr. Cliff Dial, a Special deputy sheriff, was excluded from the room, he stood just outside of the door where he could be observed by the defendants and their counsel, and he would hold his ear down near the keyhole [fol. 195] in the door, as if he were trying to hear what was said by the defendants to their counsel, and he repeated this effort to the knowledge of the defendants and the affiant, as they could see him through the glass in the door, and the defendants expressed themselves secretly to affiant that they were afraid to talk about the case. On two or three occasions while the conference was going on, Mr. Cliff Dial opened the door a little ajar and poked his head in the door and stated that he wanted to deliver a message to the sheriff who was in the room, and after this conference had been hurried two or three different times by the courier announcing that the court did not want to unduly hurry the conference but wanted them to hurry up and come on and begin the trial, the defendants and their counsel came out and had had no time to confer with their witnesses and no opportunity to learn anything about the case except a smattered effort at whispered conversations in the room in this way to their counsel.

The case was then called against all three of said defendants; they were not advised that they were entitled to a severance or that they were entitled to a special venire from which to draw a jury, but the court announced that he had appointed two other counsel to assist in the defense, Mr. Davis and Mr. Davis, and they came and took seats at the bar in the case, but affiant states that neither of the three men assigned with him in the trial of said cause were at all in sympathy with the defendants, but all prejudiced the case, and thought they should be convicted. That affiant

himself had heard from the officers that they had voluntarily confessed to the murder and he himself at that time had no doubt of their guilt and was simply going through [fol. 196] the form of a trial in this way. Twelve men then were called into the box by the court and they began taking evidence, the court having had pleas of Not Guilty entered for them. The trial continued until late in the afternoon, and it had developed that the negroes had been terrifically whipped and abused and clearly the confessions extorted from them. All of the defendants were very much excited and bewildered from the time they were brought in court until the court took a recess late in the afternoon, this being the 5th day of April, and ordered the prisoners taken back to Meridian. They were immediately hustled into the conveyances and left for Meridian without any opportunity to confer with their counsel or witnesses or any one else.

The next morning, being the 6th day of April, 1934, the defendants were brought into court and immediately the trial began and continued through the day, and during the day it developed that Mr. Cliff Dial, who made the arrest of each of them, did so terrorize them by the most cruel and brutal whippings and beatings and by hanging one of them by the neck until his neck was all scarred up with a ring around it that could be observed clear across the court room, and this had been brought out in evidence and admitted by Mr. Cliff Dial and others, and we could then see why the ignorant negroes were in such desperate fear of Mr. Dial, and that they had upon their bodies tremendous sores and stripes placed there by the whippings and this was brought to the attention of the court and the district attorney and the jury and in open court, and that then the evidence rested in the case; the jury went out after hearing a feeble argument, and returned in open court a verdict of guilty of murder against each of the defendants, and as soon as the court could look at a calendar and arrange [fol. 197] the date for the execution, upon the motion of the district attorney, they were called to the bar of the court and sentenced to be hanged, and the date set for their execution, and as soon as this was done, the prisoners were immediately hand-cuffed, taken out of the court room, and driven away for Meridian, the county seat of another county thirty miles away with no opportunity to make a motion for a new trial, it being after dark on the night of the 6th, no money in the hands of anybody to pay for going

down there to visit them or have any talk with them, and without their having been brought back or given any opportunity to make a motion for a new trial or confer with counsel about making one. The court next morning signed the minutes and adjourned the court for the term, and affiant states upon oath that such was the manner and haste in which the trial was conducted, and that just before the date of the execution, he went at his own expense down to Meridian, and had a conference with each of the defendants and so impressed was he with their innocence that he prepared and had executed a paupers' oath and petition for appeal, two of the other attorneys declining to have anything to do with any effort at appeal in said cause, and the 3rd only permitted his name to be used, but took no part (Davis) and procured the stenographer to transcribe the notes of the evidence, and had the record certified to the supreme court.

(Signed) John A. Clark.

Sworn to and subscribed before me this the 5th day of February, 1935. (Signed) Mae Munn, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 198] IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

[Title omitted]

AFFIDAVIT OF YANK ELLINGTON—Filed Feb. 5, 1935

Personally appeared before me, the undersigned authority, authorized to administer oaths under the laws of the State of Mississippi, Yank Ellington, who says upon oath that he is one of the appellants in a case now pending upon appeal before the Supreme Court of Mississippi, styled Ed Brown, et al v. State of Mississippi, No. 31,375. Affiant further says upon oath that on Friday, the 29th day of March, 1934, he learned that Mr. Stewart was killed, and that he lived about a mile from Mr. Stewart's house, and he went over there to see if there was anything he could do about the matter and any help he could render; that he

found a number of people gathered in and around the house; that later on that evening Mr. Cliff Dial came down to his house and asked him and Mannie Brooks, another Negro boy to come on up to the Stewart's house and that when he got up there he found a number of people there; that they began accusing him of having known something about the killing of Mr. Stewart, and also accused Mannie Brooks, and that a mob seized them, led very largely by Mr. Cliff Dial, a deputy sheriff, and that they hanged him by a rope to the limb of a tree for a while, and then let him down and tried to make him confess that he knew something about the killing, and when he denied any knowl- [fol. 199] edge of it they hanged him the second time. That in addition to hanging they skinned his neck all up with the rope and tied him around a tree and gave him a severe whipping on his naked body. That upon having declined to confess to a murder of which he was innocent, they released him and he went home, suffering great pain and agony. That later on, a day or two, he being so beaten and treated that he was incapable of remembering whether it was one or two days, Mr. Cliff Dial came and arrested him again, and told him that he was taking him to Meridian for safe keeping, as he was afraid that he would be mobbed if he left him there, and that on the way to Meridian he stopped by the roadside and accused him of lying and said that he was going to have to belch up the truth about who killed Mr. Stewart, and that he made him strip his clothing off and took a leather strap, with a buckle on the end of it, and whipped him until he cut his body in stripes; that he swore all of the time that he had not had anything to do with it, and knew nothing about it but Mr. Dial told him that unless he came on and told him the truth and admitting the killing and implicated others who he said were in it, that he was going to whip him to death, and he then told him "Tell me what to say and I'll say it", and under this desperate effort to save his own life, from being cruelly beaten to death, he admitted anything that Mr. Dial asked him to admit, and that he was so severely wounded and bruised, and suffering so greatly that he was not sufficiently conscious to know what he did say.

That he was then carried to Meridian and placed in jail, and that two other people, his codefendants, Ed Brown and Henry Shields, were taken in the jail by Mr. Cliff Dial [fol. 200] and others into a room and so severely beaten

and whipped that they came back into the jail and were bleeding and suffering, and admitted that they were prepared to tell him whatever he wanted told in order to save their lives.

That Mr. Dial told him that he was "going to be talked to by somebody else about this killing and what you have told me, or what I have whipped out of you, is the truth, and you must stick to this truth and don't tell anything else but this same truth which you have told me or I will whip you again", and that on Monday night, the 2nd day of April, 1934, the sheriff of Kemper county and the sheriff of Lauderdale county came into the jail and had the jailer bring all three of them out into a vacant room and requested them to sit down on a box, and one of them, Henry Shields, was so beaten that he could hardly walk, and we were told by Mr. Adcock, the sheriff of Kemper county that we must tell him the truth about what happened in connection with the killing of Mr. Stewart and we started to tell him that we knew nothing about it and he stopped us and said "No, boys, that is not the truth, now you are going to have to tell the truth".

When we were brought out of the cell in the jail to go into the room where the sheriffs were, we were told by the jailer "Now, you boys have got to stick to your same stories you told Mr. Dial, otherwise you will be whipped again", and fearing that the sheriffs would immediately leave and we would be immediately whipped again, we repeated to the sheriffs the same story we had told to Mr. Dial and others who whipped us, except Henry Shields said that "I am so near dead anyway I am going to tell the truth", and said "I never had anything to do with the killing". I was afraid to make that statement and tell the real truth to the effect that I had nothing to do with the murder and knew nothing about it.

[fol. 201] On the following Wednesday, being the 4th day of April, 1934, we were all three carried up to DeKalb. We were taken out and carried in the court house before Judge Sturdivant on the Bench, and there a paper was read to us, charging us with killing Mr. Stewart, and we were asked to say whether we were "guilty" or "not guilty." Mr. Dial was standing there close by us, looking us in the face with a hard look. We did not know but what we would be taken to prison that night if we denied

it, and whipped again, and Henry Shields said "We just as well say we are guilty." I was so frightened and terrorized that I could not talk. The Judge asked us if we wanted a lawyer and Henry said "I don't think it will do any good." And, thereupon, the Judge said "I will appoint Mr. Clark and Mr. .... to defend you, the name of the other gentleman I don't remember, and the Judge said then "You can return the prisoners to Meridian for safekeeping," and we were then handcuffed and carried to Meridian, and the next morning we were brought out of the jail and Mr. Clark said "We have had no chance to talk to these negroes about their cases, and will ask the Court to give us some time to talk to them and their witnesses," and the sheriff and some deputies, including Mr. Cliff Dial went to a room with us in the court house, but Mr. Clark made some objection to Mr. Dial being in the room and he got out and stood on the outside of the door. I could see him through the glass, and he would keep stooping down every few minutes and listening through the key hole to see what we were saying, and I knew it would never do for him to know that we were changing up what we had been forced to tell him at the time we were abused; and two or three times a man would stick his head in the door and tell us that the Judge said that he did not want to hurry us [fol. 202] too much, but he was anxious to go on with the trial, and we were not able to tell Mr. Clark much about it. The other three lawyers did not seem to take any interest in our case.

We then went out in the court room and they put some men on the jury, and the District Attorney said "These men are all right," and then Mr. Clark asked that we go out in a room and have a conference about it, and Mr. Clark wanted to put certain men off of the jury, but the other lawyers said "No, leave them on there," and after while they said "Well, if you want to put those men off why who is going to do it; who is going to go out there and challenge those white men off the jury in these negroes' case," and each of them said that they did not want to start any trouble there, and finally Mr. Clark said "Well, some of us ought to have the nerve to go in there and tell them to stand aside," so they then decided to flip a coin as to which one should do this, and it fell to Mr. .... to do it, so he went and told them to get off the jury, and they

then called some more men and commenced trying us, and went on until night, and then the Judge told the sheriff to take us back to Meridian and brought back next morning, then went on in the court house and went to trying us again, and that lasted until about dark when the jury came in and said that we were guilty, and then the Judg sentenced us to be hanged and told the sheriff to take us back to Meridian, and he put handcuffs on us and marched us out and got in the conveyances and we were taken to Meridian. We did not have any opportunity to talk to our lawyers and tell them what our witnesses would know, or what we were doing, or anything about the cases except to tell him that we were not guilty and had nothing to do with the killing.

[fol. 203] I positively swear that I am innocent of having had anything to do with, or having known anything about who killed Mr. Stewart, for I certainly did not kill him, or assist in killing him.

(Signed) Yank his X mark Ellington.

Sworn to and subscribed before me this the 6 day of February, 1935.

(Signed) E. D. Fondren, Circuit Clerk, by H. T. Ashford, Jr., D. C. (Seal.)

[File endorsement omitted.]

[fol. 204] IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

[Title omitted]

No. 31375

AFFIDAVIT OF ED BROWN—Filed Feb. 5, 1935

STATE OF MISSISSIPPI,
County of Hinds:

Personally appeared before me the undersigned authority authorized to administer oaths under the Laws of the State of Mississippi, Ed Brown, who says upon oath that he is one of the appellants in the above styled cause and that on March 29, 1934, Mr. Stewart was found in a dying condition at his home and during the day of March 29,

1934, died; and that affiant and Yank Ellington and Henry Shields were arrested by Mr. Cliff Dial, a Deputy Sheriff of Kemper County, and charged with the said crime of murder in the killing of Mr. Stewart; and that they were all three carried to Meridian in Lauderdale County and placed in jail there; and that on Sunday night, the 31st day of March, 1934, Mr. Cliff Dial, the Deputy Sheriff of Kemper County, Mississippi, came into the jail at Meridian in Lauderdale County and in the company of others with him, affiant was brought out into a room in the jail and made to strip his clothing off and was there told that he was going to be compelled to disclose what he had to do with the killing of Mr. Stewart and others who were into it, and that [fol. 205] affiant knew nothing thereabout as to who did it and had nothing to do with it himself and he so told Mr. Dial and the other men present. But he was put down over an object and literally cut to pieces with a heavy leather strip with brass buckles on it and whipped until he couldn't stand any more and was told that he would be whipped to death unless he confessed to the killing but after he had almost been whipped into insensibility or unconsciousness, he told Mr. Dial he would tell anything that he asked him to tell and he told him what he wanted him to say about that that he knew was the truth and that he told him, "Yes, he would say that or anything else he asked him to say to get him to stop whipping him," and the so-called confession was obtained in this way. He was then told by Mr. Dial that he would be approached by other people there inquiring about the matter and that he must tell them the same story for if he changed the story or denied it, he would whip him again; and after the other appellants, Shields and Ellington, had been terribly whipped, they were all three made to tell the same story and warned to stick to it, for if they ever changed that story they would whip them to death;

They were then left in this miserable condition until the next night, being Monday night, the jailer who was present when they had been whipped on Sunday night came and unlocked their cell and brought all three of them out back into the same room where they had been whipped the night before, and they found in the room, Mr. Adcock, Sheriff of Kemper County, and two other men. I was told that one of them was the Sheriff of Lauderdale County, Mr.

Stevens. We were then asked to tell what we had to do with the killing of Mr. Stewart and we all started to say that we didn't know anything about it when Mr. Adcock stopped us and said: "Now, that is not the truth and you boys are going to have to tell the truth, your story doesn't ring right." Thereupon, we went ahead and told him the [fol. 206] same thing Mr. Cliff Dial had made us tell the night before, feeling certain that we would be whipped again if we didn't. We were so badly whipped and beaten and bruised that we could scarcely get down the stairway at the end of the room. When the jailer brought us out of the cell before going to the room, he told us: "Now, you boys will have to stick to the same story that you told Mr. Dial, if you don't you will be whipped again," and when he returned us to the cell, we were asked by him if we changed our story either [illegible] us and we told him "No," and he said "It's good you didn't, as you would be whipped again if you had changed your story";

Then, on Wednesday, the 4th day of April, 1934, we were taken out of the jail at Meridian and carried to DeKalb in Kemper County and were carried into the Court House and there we were told by the District Attorney who read a paper to us that we were charged with murdering Mr. Stewart and we were asked whether we were guilty or not guilty, and Henry Shields said we just as well plead guilty. Mr. Dial was standing there in a few feet of us looking us straight in the face at the time and we were sure as soon as the Court proceedings were over, we would be carried to jail either at Meridian or in DeKalb, and that if we denied it, we would be whipped again. We were asked by the Judge if we wanted a Lawyer and we told him we didn't know if it would be any use for us to have a Lawyer. He then told us he would appoint Mr. John Clark and somebody else whose name I don't remember, as Lawyers for us and that they would try us tomorrow. Thereupon, we were taken out and put in the conveyance and hurried back to Meridian jail. The next morning, we were brought out of jail at Meridian and carried back to DeKalb. Then Mr. Clark asked to have a talk with us and we were sent in a room and Mr. Cliff Dial started to come in the room with us and Mr. Clark objected to his being in the room and the Sheriff told him to stay out. He stayed just on the out-[fol. 207] side of the door and there was a glass in the door

and we could see him. He was standing there right by the door watching us and would lean down with his ear close to the keyhole in the door so he could hear what was going on in the room and we were afraid to talk to Mr. Clark and the other lawyer and afraid to deny that we killed Mr. Stewart, and we could only in a whisper conversation tell Mr. Clark we didn't do it, and didn't know who did do it. That every few minutes Mr. Cliff Dial would open the door and stick his head in and say that he wanted to tell the Sheriff something and then close the door and stand right by it, and drop his ear down by the keyhole so as to hear what we would say. And about three or four times while we were trying to talk to Mr. Clark in this way, a messenger would come in and say the Judge said, he didn't want to hurry you fellows too much but he was anxious to go on with the trial. We then come on out of the room and they had some men called they said was the jury and the District Attorney said they were agreeable jury to him. And then Judge asked if they were agreeable to us and we went out in the room again and Mr. Clark said, "there are some of those men that we know are bitter against us and would convict us," and the other lawyers in the room said "Oh, go ahead and take them," but Mr. Clark said "No" and they then agreed with him to put these men off. They then asked who would go out and put them off, and each one said they didn't want to do that because they didn't want to make the white men mad by putting them off the jury. So, they decided to throw up a coin and decided in this way which one should tell them to get off the jury; and then the one they selected in this way when we went back in the Court room told them that they were excused and then some more men were called and we went on with the trial, and late that afternoon, the Court said he would take a recess out of the next day at 9:00 o'clock. We were then carried out and put in the conveyance and carried back to the jail at Meridian. Then Sheriff said he was [fol. 208] afraid to put us in jail in Kemper County for fear we would be mobbed.

The next morning, being the 6th day of April, we were brought over to Dekalb and they finished hearing the evidence and the jury walked out into a room after the lawyers did some talking and come back and said we were each one guilty of murdering Mr. Stewart and the Judge had us

stand up and as soon as he could look at a calendar, he sentenced us to be hanged and set the day for the hanging. Then we were handcuffed, carried right on out, put in a conveyance and carried back to Meridian.

We had not time or opportunity to confer with our wives or our relatives to get anybody to do anything for us. We were never told that we had a right to have a special venire to draw jurors from; we were never told that we had any right to make a motion for a new trial and we had no time to consult with our lawyers except as above stated. We did not know that we could make a motion for a new trial.

I am innocent in this case. I had nothing whatever to do with the killing of Mr. Stewart and do not know anything about who killed him.

(Signed) Ed his X mark Brown.

Sworn to and subscribed before me, this the 6 day of February, 1935.

(Signed) E. D. Fondren, Circuit Clerk, by H. T. Ashford, Jr., D. C. (Seal.)

[File endorsement omitted.]

[fol. 209] IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

[Title omitted]

AFFIDAVIT OF HENRY SHIELDS—Filed Feb. 5, 1935

STATE OF MISSISSIPPI,
County of Hinds:

Personally appeared before me the undersigned authority authorized to administer oaths under the Laws of the State of Mississippi, Henry Shields, who says upon oath that he is one of the appellants in the above styled cause and that on March 29th, 1934, Mr. Raymond Stewart was found in a dying condition at his home, and during the day of March 29, 1934, died; that affiant and Yank Ellington and Ed Brown were arrested by Mr. Cliff Dial, Deputy Sheriff of Kemper County and charged with the said crime of murder in the killing of Mr. Stewart, and that they were all three

carried to Meridian in Lauderdale County and placed in jail; and that on Sunday night, the 31st day of March, 1934, Mr. Cliff Dial, Deputy Sheriff of Kemper County, Mississippi, came into the jail at Meridian in Lauderdale County, accompanied by Mr. Guy Jack and other people. That affiant was brought out into a vacant room in the jail and was made to strip his clothing off and was there told that he was going to be compelled to disclose what he had to do with the killing of Mr. Stewart, and the conduct of others who were in it with him; and that affiant knew nothing about who did it and had nothing to do with it himself and [fol. 210] he so told Mr. Dial and the other men present. But he was put down over an object and literally cut to pieces with a heavy leather strap with brass buckles on it and whipped until he couldn't stand it any more; and then was told by Mr. Dial that he would be whipped to death unless he confessed to the killing and after he had almost been whipped to insensibility or unconsciousness, he told Mr. Dial he would tell anything that he asked him to tell and he told him what he wanted him to say about that that he knew was the truth, and he told him, "Yes, he would say that or anything he asked to get him to stop whipping him"; and the so-called confession was obtained in this way. He was then told by Mr. Dial that he would be approached by other people there inquiring about the matter and the he must tell them the same story for if he changed the story, he would be whipped again. And after Brown and Ellington had been terribly whipped, they were all three made to tell the same story and warned to stick to it for if they changed that story, they would be whipped to death.

They were then left in this miserable condition until the next night, being Monday night, when the jailer who was present when they had been whipped on Sunday night came and unlocked their cell and brought all three of them out back into the same room where they had been whipped the night before and they found in the room, Mr. Adcock, Sheriff of Kemper County and two other men, and were told that one of them was the Sheriff of Lauderdale County, Mr. Steves. We were they asked to tell Mr. Adcock what we knew about the killing of Mr. Stewart and all started to say that we didn't know anything about it when Mr. Adcock stopped us and said: "Now, this is not the truth and

you boys are going to have to tell the truth, your story does not ring right". Thereupon, we went ahead and told him [fol. 211] the same thing that Mr. Cliff Dial had made us tell the night before, feeling sure we would be whipped again if we didn't. We were so badly whipped and beaten and bruised that we could scarcely get down the stairway to the room.

When the jailer brought us out of the cell before going to the room, he told us, "now, boys you will have to stick to the same story you told Mr. Dial last night, if you don't you will be whipped again." And when he returned us to the cell, he asked if we changed our story, either of us, and we told him, "No", and he said "It's a good thing you didn't as you would be whipped again if you had changed your story".

When on Wednesday, the 4th day of April, 1934, we were taken out of the jail at Meridian and carried to Dekalb in Kemper County and were carried to the Court House and we were told by the District Attorney who read a paper to us that we were charged with the murder of Mr. Raymond Stewart. And we were asked whether we were guilty or not, and Mr. Dial was standing there in a few feet of us, looking us straight in the fact at the time, and we were sure as soon as Court was over, we would be car-ied to jail in Meridian or Dekald and if we denied it, we would be whipped again. So we just said, "Well, we just as well plead guilty". The judge then asked us if we wanted a Lawyer and we told him, we didn't know as it would be any use for us to have a Lawyer. He then told us that he would appoint Mr. John Clark and somebody else whose name I didn't remembe- as Lawyers for us and that they would try us tomorrow.

We were then immediately handcuffed, taken out to the conveyance and carried back to Meridian and put in the Meridian Jail. The next morning, being the 5th day of April, 1934, we were brought out of jail at Meridian and carried back to DeKalb and when we went in the Court [fol. 212] House, Mr. Clark asked the Judge to let him have a talk with us, and we were sent in a room in the Court House along with the Sheriff and others and Mr. Cliff Dial started to come in the room with us and Mr. Clark objected to his being in the room and the Sheriff told him to stay out. He stayed just on the outside of the door and

there was a glass in the door and we could see him. He was standing right there by the door watching us and would lean down with his ear to the keyhole in the door so he could hear what was going on in the room. And we were afraid to talk to Mr. Clark and the other Lawyer and afraid to deny that we killed Mr. Stewart and we could only talk in a whispered conversation and tell Mr. Clark we didn't do it and didn't know who did do it. Every few minutes Mr. Cliff Dial would open the door and stick his head in and say he wanted to tell the Sheriff something and then close the door and stand right by it and drop his ear down to the keyhole so as to hear what we were saying; about three or four times while we were trying to talk with Mr. Clark in this way, a messenger would come and say that the Judge said he didn't want to hurry us fellows too much but he was anxious to go on with the trial. We then come on out of the room and they had some men called that they said were the Jury and the District Attorney said they were an agreeable jury to him and then the Judge asked if they were agreeable to us and we went out in the room again and Mr. Clark said there are some of those men who are very bitter against us and the other lawyers said, "Oh, go on and take that jury" but Mr. Clark said, "No" and they then agreed with him to put these men off. They then asked who would go out and put the men off, and each of them said they didn't want to do that because they didn't want to make the white men mad by putting them off the jury, so they decided to throw up a coin and decide in this way which one was to go and the one they selected in this way went back in the Court room and told them that they [fol. 213] were put off the jury; and then some more men were called and we went on with the trial which the Judge then said we would take a recess until the next morning at 9:00 o'clock;

Then we were handcuffed, taken out and put in the conveyance and carried back to Meridian. The Sheriff said he was afraid to put us in jail in Kemper County for fear we would be mobbed.

The next morning, being the 6th day of April, we were brought over to Dekalb and they finished hearing the evidence and the jury walked off into a room after the lawyers had done some talking and come back and said we were each found guilty of the murder of Mr. Stewart, and

the judge had us stand up and as soon as he -ould look at a calendar, he sentenced us to be hanged and set the day for the hanging. Then we were handcuffed, carried out to the conveyance and carried back to Meridian.

We had no time or opportunity to confer with our wives or our relatives or even get to see them to get anybody to do anything -or us. We were never told that we had a right to have a special venire to draw jurors from; we were never told we had any right to make a motion for a new trial and we had no time to consult with our lawyers except as above stated. We did not know we could make a motion for a new trial.

I am innocent in this case. I had nothing whatever to do with the killing of Mr. Stewart and do not know anything about who killed him.

his
(Signed) Henry x Shields.
mark

Sworn to and subscribed before me, this the 6 day of February, 1935. (Signed) E. D. Fondren, Circuit Clerk, by H. T. Ashford, Jr., D. C. (Seal.)

[File endorsement omitted.]

[fol. 214] IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

[Title omitted.]

MOTION FOR WRIT OF CERTIORARI—Filed March 19, 1935

Comes the State of Mississippi, appellee, acting by and through her Attorney General, Greek L. Rice, and moves the court for writ of certiorari, directed to the Clerk of the Circuit Court of Kemper County, Mississippi, requiring him to send up to the clerk of this court certified copies of the following entries on the minutes of the Circuit Court of Kemper County, Mississippi, so as to complete the record of the trial of the above styled and numbered cause in that

court, same being number 3168 on the general docket of the Circuit Court of that county:

1. Order of the Circuit Court, extending the regular March, 1934 term for a period of two weeks, the date of said order being March 29th, 1934; said order being recorded in Minute Book 3, at page 232.

2. Order reconvening the grand jury for further deliberation during the two weeks extended term of the [fol. 215] regular March 1934 term of that court, said order appearing in Minute Book 3, at page 249.

3. The final report of the grand jury and petition for discharge, dated April 4th, 1934, and appearing in Minute Book 3, page 252.

4. Any and all other orders, if any, entered in said cause which were not sent up with the original record in this cause.

State of Mississippi, by Greek L. Rice, Attorney General, by W. D. Conn, Jr., Assistant Attorney General.

Certificate

I, W. D. Conn, Jr., Assistant Attorney General, in and for the State of Mississippi, hereby certify that I have this day delivered in person to Honorable Earl Brewer, of counsel for appellants, a true copy of the foregoing motion for writ of certiorari.

Witness my signature, at Jackson, this 19th day of March, 1935.

W. D. Conn, Jr., Assistant Attorney General.

[File endorsement omitted.]

[fol. 216] IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

[Title omitted.]

ORDER GRANTING MOTION FOR WRIT OF CERTIORARI—March 12, 1935

This cause this day came on to be heard on the Motion for certiorari filed herein and this court having sufficiently

examined and considered the same and being of the opinion that the same should be sustained doth order and adjudge that said motion be and the same is hereby sustained. It is further ordered and adjudged that the Clerk of this court do issue a writ of certiorari directed to the Circuit Clerk of Kemper County directing him to send to this court instanter a certified copy of the following, to-wit:

1. Order of the Circuit Court, extending the regular March 1934 term for a period of two weeks, the date of said order being March 29th, 1934; said order being recorded in Minute Book 3, at page 232 thereof.

2. Order reconvening the grand jury for further deliberation during the two weeks extended term of the regular March 1934 term of that court, said order appearing in Minute Book 3, at page 249 thereof.

3. The final report of the grand jury and petition for discharge, dated April 4th, 1934 and appearing in Minute Book 3 at page 252 thereof.

4. Any and all other orders, if any, entered in said cause which were not sent up with the original record in this cause.

[fol. 217] IN SUPREME COURT OF MISSISSIPPI

WRIT OF CERTIORARI

THE STATE OF MISSISSIPPI,

To the Clerk of the Circuit Court of Kemper County—
Greeting:

Whereas, in the case of Ed Brown et al. vs. State No. 31 375, now pending in our Supreme Court, a diminution of the record on file therein has been suggested.

You are hereby commanded to send up to our Supreme Court, duly certified under your hand and seal of said Circuit Court, a true transcript of

1. Order of the Circuit Court extending the regular March 1934 term for a period of two weeks, the date of said order being March 29th 1934; said order being reorded in Minute Book 3 at page 232.

2. Order Reconvening the Grand Jury for further deliberation during the two weeks extended term of the reg-

ular March 1934 Term of that court; said order being corded in Minute Book 3 at page 232.

3. The final report of the grand jury and petition for discharge dated April 4th, 1934, and appearing in Minute Book 3 at page 252.

4. Any and all other orders, if any, entered in said cause which were not sent up with the original record in this cause. together with this Writ, so that the same be before our Supreme Court Instanter.

Herein fail not.

Witness, the Hon. Sydney Smith, Chief Justice of said Court, and the seal thereof, at Jackson, this the 27th day of March, A. D. 1935.

Tom Q. Ellis, Clerk, by (Signed) E. L. Shelton D. C.

(Seal.)

[fol. 218] IN SUPREME COURT OF MISSISSIPPI

ORDER EXTENDING THE MARCH 1934 TERM OF CIRCUIT COURT FOR KEMPER COUNTY MISSISSIPPI FOR 2 WEEKS—Filed March 30, 1935

March 29, 1934.

Court met persuant to adjournment. President all officers of the Court.

It appearing to the court that the business of the court makes it advantageous and proper to extend this term of court for two weeks so that the court may be able to take care of the business now before it. It is therefore ordered that this term of Court be and the same is hereby extended for two weeks, through Saturday, April 14, 1934.

Witness my hand this 29th day of March 1934.

J. I. Sturdivant, Judge.

Clerk's certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 219] IN SUPREME COURT OF MISSISSIPPI

ORDER RECALLING THE GRAND JURY—Filed March 30, 1935

It appearing that the Grand Jury which was empaneled, sworn, and charged at the present term of court has been

discharged by the Court on a former day of this term, and it now being brought to the attention of this Court that matters of grave and serious import have transpired in Kemper County since the discharge of said Grand Jury and that it is important to the welfare of the county that said matters be speedily investigated by a Grand Jury, it is hereby ordered by the Court that said Grand Jury be reconvened during this term of Court to meet at 9:00 o'clock A. M. on the 4th day of April, 1934, and that process be issued by the Clerk to the Sheriff directing him to summons all of the said Grand Jury to reconvene at said time and that all process for witnesses that may be desired before said Grand Jury be issued to appear before them at that time.

Witness my hand this the 3rd day of April, 1934.

J. I. Sturdivant, Judge.

Clerk's certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 220] IN SUPREME COURT OF MISSISSIPPI

FINAL REPORT OF THE GRAND JURY AND PETITION FOR DISCHARGE

Wed., April 4, 1934.

STATE OF MISSISSIPPI,
County of Kemper:

To the Hon. J. I. Sturdivant, Circuit Judge:

We the Grand Jury beg leave to make the following report:

We have been in session since nine A. M. this date, and have examined six witnesses and have returned into open Court two true bills of indictment. We have inquired into all matters that came to our attention in which the witnesses were reasonably available and we now respectfully ask to be discharged.

S. J. Davis, Foreman.

Clerk's certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fol. 221] IN THE SUPREME COURT OF MISSISSIPPI

[Title Omitted]

In Banc: Smith, C. J.

OPINION—On Suggestion of Error—Filed April 29, 1935

The judgment herein was affirmed on a former day and we then held that the court below committed no error in admitting in evidence the appellants' confessions, and that its error, if such it was, in admitting certain other evidence, was cured by its being thereafter excluded.

The appellants suggest that we erred in both holdings and also suggest that the judgment should be reversed for other reasons now asserted for the first time, and which will be hereinafter stated.

1. Were the confessions erroneously admitted? When the confessions were offered the court retired the jury and heard the evidence as to their competency. The appellants introduced no evidence then, as they should have if they desired to challenge the competency of the confessions, and it appeared without conflict from the state's evidence that the confessions had been freely and voluntarily made. Consequently, the court committed no error in admitting them in evidence.

After the state closed its case on the merits the appellants, for the first time, introduced evidence from which it appears that the confessions were not made voluntarily but were coerced. This evidence was given by the appellants themselves who were in the court room during the preliminary inquiry into the competency of the confessions. No request was then or thereafter made that the confessions be excluded from the evidence. We held that in the absence of such a request the court was under no duty to exclude the confessions and therefore could not be held to have erred in not so doing. In so holding we followed Loftin v. State, 150 Miss. 228, 116 So. 435, which [fol. 222] case but announced what, according to 64 C. J. 203 and 26 R. C. L. 1054, and the authorities there cited, is the rule in other jurisdictions; the appellants cite Collins v. State, 100 Miss. 435, 56 So. 527; Butler v. State, 146 Miss. 505, 112 So. 685, and Fisher v. State, 145 Miss. 116, 110 So. 361.

In Fisher's case a confession competent when admitted was afterwards made to appear incompetent and a motion was then made to exclude it. In Butler's case the court, after stating that the evidence was insufficient to support the verdict and therefore the judgment of conviction should be reversed, then without necessity therefor proceeded to say: "We can only account for the verdict * * on the theory that the state's witness * * stated * that his father owned a large plantation and employed considerable labor in the community, and that the defendant was a bad negro, and that he wanted to get rid of him. This statement was not objected to, nor was any motion made to exclude it, and of course we cannot consider it as error per se." After again stating that the evidence accounted for the verdict, the court said: "It should have been excluded, although not objected to." It is hardly probable that a division of the court there intended to overrule the court's long unbroken line of decisions, beginning with Skinner v. Collier, 4 How. 396, that the incompetency of evidence not objected to was waived and that error could not thereafter be based thereon. Moreover, this rule has been enforced since Butler's case was decided, not only in Loftin's case, supra, but also in Palmer v. Fair Co., 140 Miss 294, 105 So. 513. In Collins' case language used by counsel in an argument to the jury was held to be improper, and while the court did say that it was the duty of the trial judge sua sponte to instruct the jury that such remarks were improper and that they in their deliberations should not be governed by any such statements, the holding was beyond the requirements of the case, for the argument was objected to when made. The duty of a court sua sponte to control [fol. 223] the argument of counsel runs parallel in our decisions with the absence of a duty to exclude evidence not objected to. See cases cited in the Collins opinion.

Even where the court reserves its ruling on the admissibility of evidence when objection thereto is made, and fails thereafter to rule on it, no complaint thereof can be made in the absence of a request made after the reservation for a ruling on the objection. Mallory v. Walton, 119 Miss. 396, 81 So. 113. We must decline to overrule Loftin's case and apply here a rule different from the rule applied there.

We are not here confronted with a case where the court was not legally organized or its functions interfered with by violence or threats thereof.

2. Was the admission of certain evidence said by the appellants to have been incompetent cured by its later exclusion? We adhere to our former ruling without further discussion thereof.

The questions here raised for the first time on the suggestion of error are: (1) The failure of the court below to exclude the confessions after the introduction of evidence tending to show that they were coerced, although not requested so to do, violates Sections 14 and 26 of our state constitution and the first section of the 14th amendment to the federal constitution. (2) The indictment was received and the case tried at a time when the court below had lost the power so to do. (3) The appellants were tried before the indictment was returned, or the homicide committed. (4) The name of the foreman of the grand jury was not endorsed on the indictment as required by Section 1198, Code of 1930. (5) The record does not disclose that the grand jurors who returned the indictment, or that the petit jurors who tried the case, were sworn.

3. Was Section 26 of the state constitution violated by the admission of the confessions? This section, as does the [fol. 224] common law, provides that "in all criminal prosecutions the accused * * shall not be compelled to give evidence against himself". We will assume that the admission in evidence, over the objection of the accused, of a confession coerced by violence is forbidden by this section of the constitution. Jordan v. State, 32 Miss. 382; Whip v. State, 143 Miss. 757, 109 So. 697, but see 2 Wigmore on Evidence, 2nd Ed. Sec. 823. This rule against self-crimination is not an absolute immunity but is simply a privilege, though sacred and important, of which the accused may avail himself or not at his pleasure. It may be, and is, waived unless specifically claimed. 70 C. J. 746; 4 Wigmore on Evidence, 2nd Ed. Sec. 2275; 6 Jones on Evidence, 2nd Ed. Sec. 2489; Decell v. Lewenthal, 57 Miss. 331; Spight v. State, 120 Miss. 752, 83 So. 84.

This record discloses no objection to the confessions on the ground of self-crimination, but aside from that, they were competent when admitted, and, although the appellants had the right and an opportunity so to do, no request to exclude them was made after evidence tending to show their incompetency was introduced.

4. Was Section 14 of the state constitution and Section 1 of the 14th amendment to the federal constitution violated by the admission of the confessions? These sections provide that "no person shall be deprived of life, liberty, or property except by due process of law." Immunity from self-crimination is not essential to due process of law. Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97; Snyder v. Mass., 291 U. S. 97, 78 L. ed. 674, 90 A. L. R. 575. We can add nothing to the discussion of this question that appears in the Twining case, wherein it was said: "Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, [fol. 225] and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham, many doubt it today, and it is best defended not as an unchangeable principle of universal justice, but as a law proved by experience to be expedient. See Wigmore, Ev., Sec. 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law. It should, must, and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing in it which gives it a sanctity above and before constitutions themselves". The opinion in that case sets forth the history of this privilege (as does Wigmore, op. cit. Secs. 2250 et seq.) disclosing its comparatively modern origin and its absence from our early colonial jurisprudence.

If the appellants mean to say that the failure of the court below to exclude their confessions after the introduction of evidence tending to show their incompetency, although not requested so to do, deprived them of their life or liberty without due process of law there can be no merit therein. That procedure was in accord with that applicable to all civil and criminal trials, recognized in all common law jurisdictions, and did not result in arbitrarily depriving the appellants of any constitutional or common law right. This is all that the due process clauses of the two constitutions require. The authorities in support hereof are so numerous as to make their citation supererogatory. Moreover, if the court below had erroneously overruled a motion to ex-

clude these confessions its ruling would have been mere error reversible on appeal, but would not have constituted denial of due process of law. Jones v. Buffalo Creek Coal & Coke Co., 245 U. S. 328, 62 L. ed. 325; Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91; Bonner v. Gorman, 213 U. S. 86, 53 L. ed. 709; Corrigan v. Buckley, 271 U. S. [fol. 226] 323, 70 L. ed. 969; American Railway Express Co. v. Kentucky, 273 U. S. 269, 71 L. ed. 639.

Mooney v. Holohan, L. ed. Adv. Opinion, Vol. 79, p. 347, is cited and relied on by the appellants but its relevancy here is not apparent. There the charge was that Mooney was convicted on perjury evidence, known to be such by the prosecuting officer, who suppressed evidence, unknown to Mooney, in impeachment thereof. No charge either of perjury or the suppression of evidence is here made. On the contrary, all of the facts as to the confessions being coerced were known to the appellants when they were offered and were provable by their own personal testimony.

5. When the court below received the indictment and tried the case on its merits, had it lost the power so to do? The court met in regular session on Monday, the 19th day of March, A. D. 1934, and was authorized by Section 473, Code of 1930, to remain in session for twelve days. Before the expiration of this twelve days an order was duly entered on the minutes of the court in accordance with the provisions of Section 732, Code of 1930, extending the term thereof for two weeks. The grand jury had been discharged but was recalled by the court after the beginning of the extended portion of the term, returned the indictment herein, and the case was tried during the extended portion of the term. Section 732, Code of 1930, provides that "all courts, the terms of which may be continued or extended shall possess and may exercise all the powers exercisable by the same at or during the term, or terms, which may have been so continued, or extended". As we understand the appellants' contention, it is that the statute does not authorize a court to deal in any way during the extended portion of its term with any matters that were not before it prior to the extension of the term. We cannot agree with this. The purpose of the statute is to authorize the courts to extend their regular terms and to do any and all things during the extended [fol. 227] portion thereof that they could have done prior thereto. The order extending the court's term is as follows:

"It appearing to the court that the business of the court makes it advantageous and proper to extend this term of court for two weeks so that the court may be able to take care of the business now before it. It is therefore ordered that this term of Court be and the same is hereby extended for two weeks, through Saturday, April 14, 1934".

The appellants say that this order limits the power of the court during the extended portion of its term to the dealing with such matters only as were before it when the order was entered. The power of the court at an extended term is fixed by the statute and can neither be limited nor enlarged by any order of the court.

6. Were the appellants tried before the indictment was returned or the homicide committed? This contention is based solely on a manifest clerical error in the caption to the stenographer's transcript of the evidence. This caption recites that the cause came on to be heard "on the 25th day of March, 1934". That day was Sunday, and prior to the beginning of the extended portion of the term. A recital in the caption to a transcript of the evidence in a case, if in conflict with the record of the trial, does not control, and it is manifest from the record that the indictment was returned after the homicide was committed.

7. Can the appellants now complain of the failure of the foreman of the grand jury to endorse his name on the indictment? An objection to the failure of the foreman of a grand jury to endorse his name on an indictment must be made in the court below and cannot be made in this court for the first time. Pruitt v. State, 163 Miss. 47, 139 So. 861.

8. Does the record disclose that the grand and petit juries were sworn, and if not, can the appellants' objection thereto be here considered? The transcript of the record [fol. 228] does not contain the minutes of the court impaneling the grand jury but the indictment recites that the grand jury was duly impaneled and sworn, as also does the order of the court, made after the grand jury was discharged, directing it to reassemble. This would seem to be sufficient evidence that the grand jury was in fact sworn, but aside from that, no objection thereto was made in the court below and cannot be made here for the first time. Marley v. State, 109 Miss. 717, 69 So. 210. For the same reason the objection that the petit jury was not sworn can-

not be here considered. Hill v. State, 112 Miss. 375, 73 So. 66; Cummings v. State, (Miss.) 155 So. 179; Sections 1193 and 3403, Code of 1930. Moreover, it does not here affirmatively appear that the grand and petit juries were not sworn. Hays v. State, 96 Miss. 153, 50 So. 557; McFarland v. State, 110 Miss. 482, 70 So. 563.

9. The appellants have filed what they designate as a motion in arrest of judgment, wherein they set forth matters said to have occurred on the trial which do not appear in the record. A motion in arrest of judgment will not lie in the supreme court. It reviews only the rulings of the court below complained of in an assignment of error, and in so doing is confined to an examination of the record made in the court below. It is not a court of original jurisdiction, but of appellate jurisdiction only, and therefore we cannot here examine or consider the allegations in the motion for arrest of judgment, nor the affidavits filed in support thereof.

10. Much is said in the brief of counsel for the appellants in support of the suggestion of error to the effect that these appellants are negroes and "stood before the trial court as helpless to defend themselves as sheep in a slaughter pen". In justice to the court below, we must say that this charge is not even remotely supported by the record. It [fol. 229] is based probably on things stated in ex parte affidavits in support of the motion in arrest of judgment which have no place in this discussion.

Again they say that the court below failed "to provide counsel, in reality, to defend" the appellants, and "surely it is cruel folly for the State to contend, in a court of justice, that these negroes are to be bound by the strictest and most technical rules of practice and pleading—and this after their right to counsel has been effectively denied". No request was made of the court to continue the case, to pass it to a later day, or to grant the appellants any further time for the preparation of their case.

The attorneys who defended the appellants in the court below are able lawyers of extensive practice—veterans of many forensic conflicts; and the record does not disclose that they consciously failed to discharge any duty they owed the appellants.

The rules of procedure here applied are technical only in the sense that all such rules are, and what the appellants

request is simply that they be excepted from the procedure heretofore uniformly applied to all litigants. This we cannot do. All litigants, of every race or color, are equal at the bar of this court, and we would feel deeply humiliated if the contrary could be justly said.

Nothing herein said is intended to even remotely sanction the method by which these confessions were obtained.

The suggestion of error will be overruled, and the sentence will be executed on Thursday, the 6th day of June, 1935.

So ordered.

[File endorsement omitted.]

[fol. 230] IN THE SUPREME COURT OF MISSISSIPPI

In Banc: Griffith, J., Dissenting

On Suggestion of Error.

The crime with which these defendants, all ignorant negroes, are charged was discovered about one o'clock P. M. on Friday, March 30, 1934. On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the State of Alabama; and while on the way, in that State, the deputy stopped and again severely whipped the defendant, declaring that he would continue

the whipping until he confessed, and the defendant then [fol. 231] agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.

The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. On Sunday night, April 1, 1934, the same deputy, accompanied by a number of white men, one of whom was also an officer, and by the jailer, came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers. When the confessions had been obtained in the exact form and contents as desired by the mob, they left with the parting admonition and warning that if the defendants changed their story at any time in any respect from that last stated, the perpetrators of the outrage would administer the same or equally effective treatment.

Further details of the brutal treatment to which these helpless prisoners were subjected need not be pursued. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account, than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.

All this having been accomplished, on the next day, that is on Monday, April 2, when the defendants had been given time to recuperate somewhat from the tortures to which they had been subjected, the two sheriffs, one of the county [fol. 232] where the crime was committed, and the other of the county of the jail in which the prisoners were confined, came to the jail, accompanied by eight other persons, some of them deputies, there to hear the free and voluntary confession of these miserable and abject defendants. The sheriff of the county of the crime admitted that he had heard of the whipping, but averred that he had no personal

knowledge of it. He admitted that one of the defendants, when brought before him to confess, was limping and did not sit down, and that this particular defendant then and there stated that he had been strapped so severely that he could not sit down, and as already stated, the signs of the rope on the neck of another of the defendants were plainly visible to all. Nevertheless the solemn farce of hearing the free and voluntary confessions was gone through with, and these two sheriffs and one other person then present were the three witnesses used in court to establish the socalled confessions, which were received by the court and admitted in evidence over the objections of the defendants duly entered of record as each of the said three witnesses delivered their alleged testimony. There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment, under every rule of procedure that has heretofore been prescribed, and hence it was not necessary subsequently to renew the objections by motion or otherwise.

The spurious confessions having been obtained—and the farce last mentioned having been gone through with on Monday, April 2nd—the court, then in session, on the following day, Tuesday, April 3rd, 1934, ordered the grand jury to reassemble on the succeeding day, April 4th, 1934, [fol. 233] at nine o'clock, and on the morning of the day last mentioned the grand jury returned an indictment against the defendants for murder. Late that afternoon the defendants were brought from the jail in the adjoining county and arraigned, when one or more of them offered to plead guilty, which the court declined to accept, and upon inquiry whether they had or desired counsel they stated that they had none, and did not suppose that counsel could be of any assistance to them. The court thereupon appointed counsel, and set the case for trial the following morning at nine o'clock, and the defendants were returned to the jail in the adjoining county about thirty miles away.

The defendants were brought to the courthouse of the county on the following morning, April 5th, and the so-called trial was opened, and was concluded on the next day, April 6th, 1934, and resulted in a pretended conviction with death sentences. The evidence upon which the conviction

was obtained was the so-called confessions. Without this evidence a peremptory instruction to find for the defendants would have been inescapable. The defendants were put on the stand, and by their testimony the facts and the details thereof as to the manner by which the confessions were extorted from them were fully developed, and it is further disclosed by the record that the same deputy, Dial, under whose guiding hand and active participation the tortures to coerce the confessions were administered, was actively in the performance of the supposed duties of a court deputy in the courthouse and in the presence of the prisoners during what is denominated, in complimentary terms, the trial of these defendants. This deputy was put on the stand by the state in rebuttal, and admitted the whippings. It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, "Not too much for a negro; not as much as I would have done if it were left to me." Two others who had par- [fol. 234] ticipated in these whippings were introduced and admitted it—not a single witness was introduced who denied it. The facts are not only undisputed, they are admitted—and admitted to have been done by officers of the state, in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the trial, including the State's prosecuting attorney and the trial judge presiding.

We have already mentioned that counsel were appointed on the afternoon before the trial opened on the following morning, and that in the meantime the prisoners had been taken away to an adjoining county. Counsel were thus precipitated into the case and into the trial without opportunity of preparation either as to the facts or the law. Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158, 165. Without having had opportunity to prepare, they assumed—erroneously as the majority now say—that the objections interposed when the so-called confessions were being introduced in chief were technically sufficient, and did not later move to exclude them when, under the undisputed testimony and the admissions of the state itself, it was fully developed that the confessions had been coerced, and that they were not receivable as evidence; and now the case of Loftin v. State, 150 Miss. 228, is seized upon as a means of

sanctioning the appalling violation of fundamental constitutional rights openly disclosed by this record—undisputed and admitted.

The case of Loftin v. State, when carefully examined, is not the case now before us, and ought not to be forced into service under the facts now being considered. No officer of the state had any part in the confessions in that case, the prosecuting officer of the State did not use the confession, knowing it was coerced, the weight of the testimony was that the confession was actually and in fact voluntary. The case now before us is thus separated from the Loftin case, in vital principle, as far as the east from the west. The case which is applicable and ought to be controlling here is Fisher v. State, 145 Miss. 116. There the alleged confession [fol. 235] was obtained in the jail by torture in the presence of the sheriff. Defendant's counsel did not object as he should have done under the rules of procedure when the confession was offered and admitted, but later and out of time moved to exclude. The conviction was sought to be maintained, as in the case now before us, on the ground that the defendant had not raised or interposed his objection to the alleged confession in the manner required by the procedural law. In reversing the sentence this Court in banc said: "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them in trials against them has been the curse of all countries. It was the chief iniquity, the crowning infamy, of the Star Chamber, and the Inquisition and other similar institutions. The constitution recognized the evils that lay behind these practices and prohibited them in this country. * * * The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure, and wherever the Court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective". See also People v. Winchester, 352 Ill. 237, 245, 185 N. E. 580; State v. Griffin, 129 S. C. 200, 35 A. L. R. 1227; Williams v U. S., 66 Fed (2nd) 868; Boothe v. U. S., 52 Fed. (2nd) 192, 197; Addis v. U. S., 62 Fed. (2nd) 329; Commonwealth v. Belinske, 176 N. E. 501; Mack v. State, 180 N. E. 279; Hagood v. Commonwealth, 162 S. E. 10; State v. Hester, 137 S. C. 145, 162; Osteen v. State, 92 Fla. 1063, 1075; People v. Brott, 163 Mich. 150;

People v. Bartley, 108 Pac. 868, 870; State v. Frost, 134 Wash. 48, 50.

To my mind it would be as becoming a court to say that a lynching party has become legitimate and legal because the victim, while being hung by the mob, did not object in [fol. 236] the proper form of words at precisely the proper stage of the proceedings. In my judgment there is no proper form of words, nor any proper stage of the proceedings in any such case as the record of the so-called trial now before us disclosed; it was never a legitimate proceeding from beginning to end—it was never anything but a factitious continuation of the mob which originally instituted and engaged in the admitted tortures. If this judgment be affirmed by the Federal Supreme Court, it will be the first in the history of that court wherein there was allowed to stand a conviction based solely upon testimony coerced by the barbarities of executive officers of the state, known to the prosecuting officers of the state as having been so coerced, when the testimony was introduced, and fully shown in all its nakedness to the trial judge before he closed the case and submitted it to the jury, and when all this is not only undisputed, but is expressly and openly admitted. C. F. Mooney v. Holohan, 55 S. Ct. (U. S.) 340. The Scottsboro cases are models of correct constitutional procedure as compared with this now before the Court. In fundamental respects, it is no better than the case reviewed in Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543, wherein the formal court procedure was without defect, but the judgment was vitiated by the substance of what actually lay behind it.

It may be that in a rarely occasional case which arouses the flaming indignation of a whole community, as was the case here, we shall continue yet for a long time to have outbreaks of the mob or resorts to its methods. But if mobs and mob methods must be, it would be better that their existence and their methods shall be kept wholly separate from the courts; that there shall be no blending of the devices of the mob and of the proceedings of the courts; that what the mob has so nearly completed let them finish, and [fol. 237] that no court shall by adoption give legitimacy to any of the works of the mob, nor cover by the frills and furbelows of a pretended legal trial the body of that which in fact is the product of the mob, and then by closing the

eyes to actualities, complacently adjudicate that the law of the land has been observed and preserved.

Anderson, J., concurs in this dissent.

[fol. 238] IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

ORDER OVERRULING SUGGESTION OF ERROR—April 29, 1935

This cause this day came on to be heard on the suggestion of error filed herein and this court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled. It is further ordered and adjudged that the appellants, Ed Brown, Henry Shields and Yank Ellington, for such their crime of murder, on the 6th day of June 1935, between the hours of 10 o'clock A. M. and 4 o'clock P. M. within the jail yard of Kemper County or at such other convenient place as the Board of Supervisors of Kemper County may designate, they, the said Ed. Brown, Henry Shields and Yank Ellington, be, by the sheriff of Kemper County, hanged by the necks until they are dead. It is further ordered and adjudged that the County of Kemper do pay the costs of this appeal to be taxed, etc.

[fol. 239] IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

[Title omitted]

PETITION OF ED BROWN, YANK ELLINGTON, AND HENRY SHIELDS, APPELLANTS, FOR AN ORDER STAYING THE EXECUTION AND ENFORCEMENT OF THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF MISSISSIPPI, TO ENABLE SAID APPELLANTS TO APPLY FOR AND OBTAIN WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES—Filed May 6, 1935

To Honorable Sidney Smith, Chief Justice of the Supreme Court of the State of Mississippi:

Your petitioners, Ed Brown, Yank Ellington, and Henry Shields, respectfully present this, their application for

an order staying the execution and enforcement of the judgment of the Supreme Court of Mississippi, rendered in the above styled cause on the 29th day of April, 1935, under the provisions of Section 350, of Title 28, of the United States Code, to enable said petitioners to apply for and obtain a writ of certiorari from the Supreme Court of the United States.

The grounds upon which said petition for certiorari will be based are as follows:

That said petitioners have been denied rights, privileges and immunities, specially set up and claimed by them, under the Fourteenth Amendment to the Constitution of the United States, and under Sections 14 and 26 of the Constitution of the State of Mississippi.

[fol. 240] The reasons why a stay is deemed necessary are as follows:

To allow sufficient time for the preparation and submission of petition for writ of certiorari, and brief in support thereof, to the Supreme Court of the United States, and the preparation of the record in said cause; and to allow sufficient time for the consideration of said petition by the Supreme Court of the United States; and in event said petition is granted, to allow sufficient time for a consideration of the cause on its merits.

This the 6th day of May, 1935.

Signed: Brewer & Hewitt, Counsel for Petitioners.

[File endorsement omitted.]

[fol. 241] IN THE SUPREME COURT OF MISSISSIPPI

[Title omitted]

ORDER GRANTING STAY—May 6, 1935

It is ordered that the mandate of this court be, and the same is hereby stayed, pending appellants' petition in the Supreme Court of the United States for a writ of certiorari to this court, and pending a consideration, by the Supreme Court of the United States, of said cause on its merits, in the event of the issuance of said writ of certiorari by said Court.

Said stay, however, is conditioned upon the presentation of said petition for certiorari, in the Supreme Court of the United States, within the time required by law.

Signed: Sidney Smith, Chief Justice of the Supreme Court of the State of Mississippi.

[File endorsement omitted.]

[fol. 242] IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, in connection with petition for certiorari to the Supreme Court of the State of Mississippi, and to include in such transcript of record the following, and no other papers and exhibits, to-wit:

Opening of Circuit Court of Kemper County, Miss.
Indictment.
Capias.
Arraignment.
Verdict of Jury.
Sentence.
Transcript of Evidence by Official Court Reporter.
Certificate of Court Reporter.
Instructions for the State.
Instructions for the Defendants.
Petition for Appeal.
Notice to Official Stenographer to Transcribe Testimony.
Pauper's Oath.
Certificate of Circuit Clerk.
Assignment of Errors.
Argument and Submission.
Majority Opinion of Court.
Dissenting Opinion.
Judgment of Supreme Court of Mississippi.

[fol. 243] Petition for Additional Time for Filing Suggestion of Error.

Order Granting Additional Time.

Suggestions of Error.

Motion in Arrest of Judgment.

Affidavit of John A. Clark.

Affidavit of Yank Ellington.

Affidavit of Ed Brown.

Affidavit of Henry Shields.

Motion for Writ of Certiorari.

Order Sustaining Motion.

Additional Record brought up by Certiorari.

Majority Opinion of Court on Suggestion of Error.

Dissenting Opinion of Court on Suggestion of Error.

Order Overruling Suggestion of Error, and Final Judgment.

Petition for Stay of Execution.

Order Granting Stay of Execution.

This præcipe and service thereon.

Your certificate to the record that it is a complete record in said cause.

This the 31st day of May, 1935.

(Signed) Brewer & Hewitt, Attorneys for Appellant.

Service of above præcipe accepted and asknowledged, this the 31 day of May, 1935.

(Signed) Greek L. Rice, Attorney General of the State of Mississippi, by W. D. Conn, Jr., Asst. Atty. Gen.

[fol. 244] Clerk's certificate to foregoing record omitted in printing.

[fol. 245] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the Supreme Court of the State of Mississippi is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 301

ED BROWN, HENRY SHIELDS AND YANK ELLINGTON,

Petitioners,

versus

STATE OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI AND BRIEF IN SUPPORT THEREOF.

J. MORGAN STEVENS,
EARL BREWER,
WILLIAM H. HEWITT,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 301

ED BROWN, HENRY SHIELDS AND YANK ELLINGTON,

Petitioners,

versus

STATE OF MISSISSIPPI.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

To the Honorable the Supreme Court of the United States:

Your petitioners respectfully show:

I.

Summary and Short Statement of Matter Involved.

The question involved in this cause is whether petitioners received the benefit of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, in their trial for murder, in the Circuit Court of Kemper County, Miss., and on their appeal to the Supreme Court of the State of Mississippi, from the judgment of said court, and sentence of death imposed therein.

Final judgment has now been entered against these petitioners by the Supreme Court of the State of Mississippi, the court of last resort in this state.

It is the contention of petitioners that due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution, was denied to them, in that the State of Mississippi contrived their conviction by the knowing use of illegal and incompetent evidence, secured by officers and agents of the State in gross violation of the law.

The illegal and incompetent evidence here complained of consisted of incriminating statements secured from petitioners by officers of the State through the subjection of petitioners to physical torture, said statements being fraudulently offered by the State, on petitioners' trial, as free and voluntary confessions, and in defiance of Section 26 of the Constitution of the State of Mississippi, the pertinent portion of which reads:

> "In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; *and he shall not be compelled to give evidence against himself;*" (Italics ours.)

Petitioners further contend that they were denied due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution, in that their right to counsel, on said trial, was, in reality denied to them.

That they were denied due process of law, in that the trial judge entered judgment against them, and sentenced petitioners to death, at a time when he had lost jurisdiction of the cause through the denial to petitioners of fundamental rights. That no opportunity was afforded them to make proper motion for a new trial.

Further, that the decision of the Supreme Court of Mississippi is, itself, a denial of due process of law, in that

said decision arbitrarily denies to petitioners fundamental rights, guaranteed by the Federal Constitution.

It is contended by the State that its use of said confessions, in evidence, does not amount to a denial of due process of law, as guaranteed by the Federal Constitution, in that immunity from self-incrimination is not, in itself, an essential to due process of law.

That there was no denial of due process of law in the failure of the trial court to exclude said evidence of confessions, when its incompetency became apparent, in that no motion was made by petitioners to exclude same.

That Motion in Arrest of Judgment, and for New Trial came too late.

That there is no showing on the record that petitioners were, in reality, denied counsel by the trial court, in that the record does not disclose the conscious failure of counsel to discharge their duty.

Statement of Facts.

Petitioners, three ignorant negroes, (R. 126, 39, 51, 112) were indicted Wednesday, April 4, 1934, (R. 1) at an extension of the March term of the Circuit Court of Kemper County, Mississippi, (R. 164) for the murder of a white planter, (R. 77, 66, 67) Raymond Stewart, whose death occurred, (R. 8, 11) in said county on Friday of the week previous. (R. 6, 10.)

On a date not directly disclosed by the record, but, presumably, immediately following indictment, petitioners were arraigned, pled "Not Guilty" (R. 2) and counsel was appointed by the court to defend them. (R. 54). On the next day after indictment, April 5, 1934, petitioners were put on trial for their lives. (R. 3.)

On said trial the state based its charge of murder on alleged confessions, which it offered as freely and voluntarily

made by petitioners, (R. 25, 35, 37, 39), while confined in the Meridian (Lauderdale County) jail, (R. 25, 34, 38) for safekeeping. (R. 23, 70.)

At the request of petitioners' counsel a preliminary examination was had of Sheriff Adcock (R. 20) the first witness by whom the state sought to prove the confessions, to determine whether the confessions were free and voluntary. Said examination revealed that during the early part of the questioning petitioners held back, and refused to make a complete statement, (R. 23), but under pressure began to talk (R. 23-24) and were then constantly corrected by Adcock when their statements met with his disapproval. (R. 23-24.) The sheriff admitted hearing of a prior confession (R. 24) and that at this time one of the petitioners bore marks of physical mistreatment, which the negro informed him was the result of whippings (R. 24), but that he was not advised and did not inquire concerning the details. (R. 24.)

Petitioners' objection to the introduction of the purported confessions was thereupon overruled (R. 25) and the testimony of Sheriff Adcock, and others who were with him at the time of said statements, was then admitted over repeated objections (R. 25, 35, 41), after which the state rested its case. (R. 41.)

Whereupon petitioners, in their own defense, testified that the alleged confessions were false (R. 43, 59, 66, 71) and procured by officers of the state, and others, by force and violence, enroute to, and in the Meridian jail. (R. 43, 58, 59, 71.) That they denied guilt until cruelly beaten (R. 43, 59, 70, 71) and threatened with death (R. 47) if necessary to coerce a confession; and that they were threatened with further punishment if they changed their story. (R. 60, 61, 55, 72.)

That on the night following the whippings the petitioners were subjected to questioning by Sheriff Adcock of Kemper

County and Sheriff Stevens of Lauderdale County, and certain other officers and persons, (R. 43, 59, 71, and that they repeated the stories they were forced to make under the lash because of fear of further punishment. (R. 60, 61, 55, 72.)

The record shows that during the trial the scars and wounds of petitioners were plainly visible, and that the attention of the court and jury was directed thereto. (R. 43, 69, 72.)

The state offered in rebuttal the testimony of a deputy sheriff, and certain others, who admitted that the negroes denied guilt until whipped. (R. 102, 106, 112, 113, 114).

An examination of the record will disclose that the only evidence of consequence, against petitioners, was the so-called "confessions." (See opinions, R. 135, 175-176.)

After hearing the evidence, argument of counsel, and instructions of the court, the jury returned a verdict of "Guilty" as to each of the petitioners; (R. 2-3) whereupon the court entered its judgment, and sentenced petitioners to be hung by the neck until dead. (R. 3.)

From this judgment petitioners appealed to the Supreme Court of Mississippi (R. 125) assigning as the principal ground of error the admission of said incriminating statements, as purported confessions. (R. 127.)

The Supreme Court affirmed the judgment of the lower court in the decision rendered by it on appeal, (R. 127), and entered its judgment, (R. 137) resetting the date for execution, a dissenting opinion being delivered by Justice Anderson. (R. 135.)

Petitioners thereupon filed in the Supreme Court of Mississippi their Suggestion of Error, (R. 138), said Suggestion asserting the Federal questions with reference to denial of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, as hereinbefore set out. (P. 2.)

As an accompaniment to the Suggestion of Error, a Motion in Arrest of Judgment, and For a New Trial was filed; (R. 141) said Motion being filed in the appellate court, as stated therein, under the theory that no opportunity had been afforded in the lower court for filing same. Said Motion was supported by affidavits of petitioners (R. 149, 153, 157) and counsel (R. 146) appointed by the lower court to represent them in the trial; said affidavits setting forth the manner in which the alleged confessions were coerced, and the further facts that counsel had no access to petitioners for sufficient time to allow preparation of the case, or to acquaint counsel with the facts.

The Suggestion of Error was overruled by the Court, and final judgment entered (R. 179). In its opinion on said Suggestion of Error, (R. 166) the court held, in regard to the Federal questions raised by petitioners, that immunity from self-incrimination is not essential to due process of law, within the meaning of the 14th Amendment to the Federal Constitution; and that failure to exclude confessions which were competent when admitted, after introduction of evidence tending to show their incompetence, in absence of request so to do, does not deny due process of law, within the meaning of the 14th Amendment to the Federal Constitution.

The court further held that the record does not disclose that counsel appointed by the court consciously failed to discharge any duty they owed appellants; and the court declined to consider the Motion in Arrest of Judgment and For New Trial, on the ground that said Motion would not lie in the Supreme Court, same being a court of appellate jurisdiction only.

A dissenting opinion was delivered by Justice Griffith, concurred in by Justice Anderson. (R. 173.)

In its final judgment, the Supreme Court re-set the date of execution of petitioners for June 6, 1935. (R. 179.)

Pursuant to Petition for Stay of Execution, (R. 179) the Supreme Court of Mississippi entered its order (R. 180) staying the execution of petitioners for a sufficient time to allow the presentation to this Honorable Court of Petition for Certiorari.

II.

Reasons Relied on for the Allowance of the Writ.

1. The Supreme Court of the State of Mississippi has decided the Federal questions herein involved, in a manner directly in conflict with the decisions of the Supreme Court of the United States, in the following cases:

Mooney v. *Holohan,* —— U. S. ——, 79 L. Ed. 347;
Powell v. *Alabama,* 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55;
Snyder v. *Massachusetts,* 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330;
Moore v. *Dempsey,* 261 U. S. 86, 67 L. Ed. 543, 43 Sup. Ct. Rep. 265;
Twining v. *New Jersey,* 211 U. S. 78, 53 L. Ed. 97, 29 Sup. Ct. Rep. 14;
Hopt v. *Utah,* 110 U. S. 574, 28 L. Ed. 262;
In re Nielsen, 131 U. S. 176, 33 L. Ed. 118;
In re Bonner, 151 U. S. 242, 38 L. Ed. 149.

2. Due process of law, as guaranteed by the Fourteenth Amendment of the Constitution of the United States, has been denied to petitioners, by the State of Mississippi, in that:

(a) A fair and just hearing has been denied to petitioners by the fraud of the State in its knowing use of illegal and incompetent evidence, secured by officers and agents of the State, in violation of the law.

Mooney v. *Holohan,* —— U. S. ——, 79 L. Ed. 347;
Moore v. *Dempsey,* 261 U. S. 86, 67. L. Ed. 543, 43 Sup. Ct. Rep. 265;

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55;
Chicago, B. & Q. R. R. v. *Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581;
Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839, 20 Sup. Ct. Rep. 687;
Ex parte Commonwealth of Va., 100 U. S. 339, 25 L. Ed. 676.

(b) A fair and just hearing has been denied to petitioners by the State of Mississippi, in that petitioners were, in reality, denied counsel, in the trial of said cause.
Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55.

(c) The trial court entered its judgment against petitioners, and sentenced them to death, at a time when it had lost jurisdiction of said cause, by the denial of due process of law to petitioners, in the trial of the case.
In re Nielsen, 131 U. S. 176, 33 L. Ed. 118;
In re Bonner, 151 U. S. 242, 38 L. Ed. 149, 14 Sup. Ct. Rep. 323;
Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55.

(d) Equal protection of the laws, within the meaning of the Fourteenth Amendment to the Federal Constitution, has been denied petitioners, in that no opportunity was allowed by the trial court for Motion for a New Trial, and the Supreme Court of the State of Mississippi refused a consideration of same, when filed therein.
State v. *Guerringer*, 265 Mo. 408, 178 S. W. 65;
Duncan v. *Missouri*, 152 U. S. 382.

(e) The decision of the Supreme Court of Mississippi is, itself, a denial of due process of law, in that said decision arbitrarily denies to petitioners fundamental rights.

Snyder v. *Massachusetts*, 291 U. S. 97; 78 L. Ed. 674, 54 Sup. Ct. Rep. 330;
Twining v. *New Jersey*, 211 U. S. 78;
Rogers v. *Peck*, 199 U. S. 425;
Maxwell v. *Dow*, 176 U. S. 581;
Hurtado v. *California*, 110 U. S. 516;
Frank v. *Mangum*, 237 U. S. 309;
Powell v. *Alabama*, 287 U. S. 45, 67;
Mooney v. *Holohan*, —— U. S. ——, 79 L. Ed. 347.

3. There is no state question sufficient to support the decision of the court, to the exclusion of the Federal question involved.

WHEREFORE petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Mississippi, commanding said court to certify and send to this Court a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 31,375, *Ed Brown, et al.*, versus *The State of Mississippi*," to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said Supreme Court of the State of Mississippi be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, July 3, 1935.

ED BROWN,
HENRY SHIELDS,
YANK ELLINGTON,
By J. MORGAN STEVENS,
EARL BREWER,
WILLIAM H. HEWITT,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 301

ED BROWN, HENRY SHIELDS AND YANK ELLINGTON,

Petitioners,

versus

STATE OF MISSISSIPPI

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The majority opinion of the Supreme Court of Mississippi, (R. 127) —— Miss. ——, 158 So. 339, was rendered January 7, 1935.

The dissenting opinion, by Justice Anderson, of the Supreme Court of Mississippi, (R. 135) —— Miss. ——, 158 So. 343, was rendered January 7, 1935.

The majority opinion of the Supreme Court of Mississippi, on Suggestion of Error, (R. 166) —— Miss. ——, Advance Sheet No. 3, Vol. 161 So. 465, was rendered April 29, 1935.

The dissenting opinion on Suggestion of Error, delivered by Justice Griffith, Anderson, J., concurring (R. 173) —— Miss. ——, Advance Sheet No. 3, Vol. 161 So. 470, was rendered April 29, 1935.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is April 29, 1935. (R. 179.)

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 of the Judicial Code, as amended by Act of February 13, 1925; 43 Statutes at Large 937, Section 344 U. S. C. A., Title 28.

3. In their Suggestion of Error, filed in the Supreme Court of the State of Mississippi (R. 138), petitioners specially set up and claimed rights and privileges accorded to them under the Constitution of the United States, said rights and privileges being in relation to due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution.

Petitioners asserted, in said Suggestion of Error, as they now represent to this Honorable Court, that their Constitutional right to due process of law, in their trial for murder, by the Circuit Court of Kemper County, Miss., and on appeal to the Supreme Court of Mississippi, had been violated by the State of Mississippi in the following particulars:

(a) By the knowing use, on the part of the State, as confessions, of statements illegally obtained from petitioners, through force and violence, by officers of the State. (R. 139, 140.)

(b) By the denial to petitioners, in reality, of representation by counsel. (R. 140.)

(c) By the judgment of the trial court, and its affirmance by the Supreme Court of Mississippi, in that the trial court had lost jurisdiction to enter said judgment, because of the denial of due process of law to petitioners, in the trial of said cause. (R. 140.)

4. In its Opinion on Suggestion of Error (R. 166), dissented to by Justices Griffith and Anderson (R. 173), the Supreme Court of the State of Mississippi considered the Federal questions therein raised and overruled same, thereby establishing and confirming the jurisdiction of this Honorable Court to review the proceedings herein; and the judgment and opinions of the Supreme Court of Mississippi, insofar as same relate to a denial of due process of law, to petitioners, within the meaning of the Fourteenth Amendment to the Federal Constitution.

The following authorities are in point as to the jurisdiction of this Honorable Court to review the Federal questions raised herein:

Great Northern Ry. Company v. *Sunburst Oil and Refining Company*, 53 Sup. Ct. Rep. 145, 287 U. S. 358, 77 L. Ed. 360;

Nickey v. *State of Mississippi*, 54 Sup. Ct. Rep. 743, 78 L. Ed. 1323, 292 U. S. 393;

Consolidated Turnpike Co. v. *Norfolk, etc., R. Co.*, 228 U. S. 326, 33 Sup. Ct. Rep. 510, 57 L. Ed. 857;

Atchison, etc. R. Co. v. *Harold*, 241 U. S. 371, 36 Sup. Ct. Rep. 665, 60 L. Ed. 1050;

San Jose Land, etc. Co. v. *San Jose Ranch Co.*, 23 Sup. Ct. Rep. 487, 189 U. S. 177, 180, 47 L. Ed. 765;

Mallet v. *North Carolina*, 181 U. S. 589, 21 Sup. Ct. Rep. 730, 45 L. Ed. 1015.

5. Further, there is no State question sufficient to support the decision of the Court, to the exclusion of the Federal question involved.

III.

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 1-7), which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Supreme Court of the State of Mississippi erred in affirming the judgment of the trial court, and in entering its judgment herein, in that the State of Mississippi contrived the conviction of petitioners, in the trial court, by the knowing use, on the part of the State, as confessions, of statements illegally obtained from petitioners, through force and violence, by officers of the State; such use amounting to a denial of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of the State of Mississippi erred in affirming the judgment of the trial court, and in entering its judgment herein, in that petitioners were, in reality, denied representation by counsel, in the trial court, and hence were denied due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of the State of Mississippi erred in affirming the judgment of the trial court, and in entering its judgment herein, in that the trial court had lost jurisdiction to enter said judgment, in the trial of said cause,

because of the denial of due process of law to petitioners, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of the State of Mississippi erred in refusing to consider Motion in Arrest of Judgment, and for New Trial, filed therein, and in affirming the judgment of the lower court, in that no opportunity was afforded petitioners for filing said Motion in the lower court; thereby denying to petitioners due process of law, as provided by the Fourteenth Amendment to the Federal Constitution, in that they were denied equal protection of the law.

5. The Supreme Court of the State of Mississippi erred in entering its judgment herein, and in its decision of said cause, in that said decision and judgment are, within themselves, denials of due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution, in that through them the court denies to petitioners their fundamenal rights.

V.

Summary of the Argument.

Point A.

Petitioners were denied due process of law by the fraud of the State, through its agents.

Twining v. *New Jersey*, 211 U. S. 78, 53 L. Ed. 97; 29 Sup. Ct. Rep. 14;

Moore v. *Dempsey*, 261 U. S. 86, 67 L. Ed. 543, 43 Sup. Ct. Rep. 265;

Snyder v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330;

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55;

Mooney v. *Holohan*, —— U. S. ——, 79 L. Ed. 347;
Chicago, B. and Q. R. R. v. *Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581;
Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839, 20 Sup. Ct. Rep. 687;
Ex parte Commonwealth of Va., 100 U. S. 339, 25 L. Ed. 676.

POINT B.

Petitioners were denied due process of law, through denial of counsel.

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55.

POINT C.

Petitioners were denied due process of law, in that the trial court possessed no jurisdiction to enter judgment.

In re Nielsen, 131 U. S. 176, 33 L. Ed. 118;
In re Bonner, 151 U. S. 242, 38 L. Ed. 149, 14 Sup. Ct. Rep. 323;
Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55.

POINT D.

Petitioners were denied due process of law, in that they were denied equal protection of the law.

State v. *Guerringer*, 265 Mo. 408, 178 S. W. 65;
Duncan v. *Missouri*, 152 U. S. 382.

POINT E.

The decision of the Supreme Court of Mississippi is, itself, a denial of due process of law.

Snyder v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330; *Twining* v. *New Jersey*, 211 U. S. 78; *Rogers* v. *Peck*, 199 U. S. 425; *Maxwell* v. *Dow*, 176 U. S. 581; *Hurtado* v. *California*, 110 U. S. 516;

Frank v. *Mangum*, 237 U. S. 309; *Powell* v. *Alabama*, 287 U. S. 45; *Mooney* v. *Holohan*, —— U. S. ——, 79 L. Ed. 347.

VI.

ARGUMENT.

Point A.

Petitioners were denied due process of law by the fraud of the State, through its agents.

This Court has long since established that one of the absolute essentials of due process of law, as provided by the Fourteenth Amendment to the Federal Constitution, is a fair and impartial trial.

Twining v. *New Jersey*, 211 U. S. 78, 53 L. Ed. 97, 29 Sup. Ct. Rep. 14;

Moore v. *Dempsey*, 261 U. S. 86, 67 L. Ed. 543, 43 Sup. Ct. Rep. 265;

Snyder v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330;

Mooney v. *Holohan*, —— U. S. ——, 79 L. Ed. 347;

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55.

Further, this Court has long since decided that due process of law is denied by a State, when prevented through the wrong of its officers and agents.

Mooney v. *Holohan*, —— U. S. ——, 79 L. Ed. 347;

Chicago, B. and Q. R. R. v. *Chicago*, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581;

Carter v. *Texas*, 177 U. S. 442, 44 L. Ed. 839, 20 Sup. Ct. Rep. 687;

Ex parte Commonwealth of Va., 100 U. S. 339, 25 L. Ed. 676;

Powell v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55.

In the trial of this cause the State of Mississippi based its charge of murder against these petitioners upon incriminating statements, coerced from petitioners by officers of the State, through physical violence, and offered by the State as free and voluntary confessions. (R. 41-78 and 25-41.)

This action on the part of the State constituted a double fraud. Not only did it offer illegal evidence, in view of Section 26 of the Constitution of the State of Mississippi; but by introducing these statements, obtained under duress, the State of Mississippi offered evidence essentially false, and tainted further by the criminal manner in which the statements were secured.

For the convenience of the Court we again quote the pertinent portion of Section 26 of the State Constitution;

> "In all criminal prosecutions the accused * * * shall not be compelled to give evidence against himself;"

It is conceded that the repetition of said statements, on the day following their original extortion, was likewise under duress, in that the statements were repeated under fear of further punishment by officers of the State; and for this reason would be inadmissible, also, under the Constitution and laws of the State of Mississippi.

Banks v. *State,* 47 So. 437, 93 Miss. 700;
Mackmasters v. *State,* 82 Miss. 459;
Whitley v. *State,* 78 Miss. 255;
Fisher v. *State,* 145 Miss. 116, 110 So. 361.

In this connection, therefore, the language of the Supreme Court of the United States, in the case of *Mooney* v. *Holohan,* —— U. S. ——, 79 L. Ed. 347, is peculiarly applicable.

This Court, on page 349 of the opinion, as reported in 79 L. Ed., said:

> "It [due process of law] is a requirement that cannot be satisfied by mere notice and hearing if a State has

> contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of the laws, may constitute state action within the purview of the Fourteenth Amendment."

On the ground of fraud, there is very little to choose between the act of the State, referred to in *Mooney* v. *Holohan, supra,* and the act of the State in the present case. The State of Mississippi, through its use, as confessions, of statements literally whipped, word for word, from petitioners, presented evidence as false as perjury. The fraud in the two cases, as to the introduction of false testimony, is essentially the same.

In the instant case, however, the fraud of the State is aggravated by the infamous mistreatment, on the part of the State, which resulted in the alleged confessions.

We earnestly contend, therefore, that the State of Mississippi, by its use of illegal, false and highly prejudicial evidence, so completely prevented a fair and impartial trial of petitioners, as to vitiate the whole proceedings against them, on the ground of denial of due process of law, as provided by the Fourteenth Amendment to the Federal Constitution.

Point B.

Petitioners were denied due process of law, through the denial of counsel.

In the recent case of *Powell* v. *Alabama,* 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55, this Court, in discussing the

requirement of the Fourteenth Amendment to the Federal Constitution, as to due process of law, ruled very positively that the right to a hearing, as a basic element of due process of law, includes the right to the aid of counsel.

This Court further held, on page 71 of its opinion, (287 U. S.):

> "* * * In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' *Holden* v. *Hardy*, 169 U. S. 366, 42 L. Ed. 780, 18 S. Ct. 383, *supra*."

In the instant case, the record discloses the following facts, in connection with the appointment of counsel, and the necessity for same:

That petitioners are ignorant and pauper negroes. (R. 126, 39, 51, 112.)

On April 4, 1934, they were indicted for murder. (R. 1.) On April 5, 1934, they were put to trial for their lives. (R. 3.)

On a date not directly disclosed by the record, but necessarily in the interval of time between the indictment and trial, petitioners were arraigned and counsel appointed by the court to defend them. (R. 2, 54.)

Under the rule as laid down by this Court, and in view of the fact that these negroes are ignorant paupers, the court was under the positive duty of appointing them counsel at

a time, and under circumstances, which would, in fact, allow the defense adequate preparation.

This the trial court did not do. It is apparent that counsel for petitioners had no real opportunity to prepare themselves for the trial of this cause. The element of time alone precluded them.

Further than this, in their Motion for New Trial, (R. 141), and especially in the affidavit, in support thereof, by Mr. John A. Clark, (R. 146) one of counsel appointed to defend these petitioners, it is established that the short and inadequate conference which petitioners had with their counsel, was constantly interrupted by messages from the court to get through as rapidly as possible. That Cliff Dial, the deputy who had whipped petitioners, stood at the door of the conference room, and so intimidated petitioners by his presence that they whispered to counsel that they were afraid to discuss the case. That no private conference, between petitioners and counsel, was ever allowed as a deputy sheriff was constantly in the room. That counsel had no opportunity to confer with the defense witnesses, and no opportunity to learn anything about the case save from a smattering, whispered conversation with petitioners, under strained circumstances.

In view of these facts, we respectfully submit that petitioners were denied due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution, in that the trial court failed, in reality, to provide them counsel.

POINT C.

Petitioners were denied due process of law, in that the trial court possessed no jurisdiction to enter judgment.

In the case of *Powell* v. *Alabama, supra,* on page 68 of the opinion, 287 U. S., the Supreme Court of the United States said:

> "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps *essential to the passing of an enforceable judgment,* and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law." (Italics ours.)

In the two preceding points, we have demonstrated to this Court that one of the preliminary steps, essential to an enforceable judgment is lacking in this cause, in that by the fraud of the State, and the denial of counsel, petitioners have not been accorded a hearing, or, as the word is often interpreted, a fair and impartial trial.

It is evident then, with this preliminary step lacking, that the trial court was without authority to enter a binding judgment against these petitioners, and its attempt to do so, was a denial of due process of law.

Quoting again from *Powell* v. *Alabama, supra,* the Court, on page 68 of the opinion (287 U. S.), said:

> "Mr. Justice Field, in an earlier case, *Galpin* v. *Page,* 18 Wall. 350, 368, 21 L. Ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' "

In the case of *Nielsen,* 131 U. S. 176, 33 L. Ed. 118, the Supreme Court of the United States again expressed the rule that the denial of a Constitutional right destroys the validity of the hearing, and the judgment of the court thereon. The Court, on page 183 of the opinion (131 U. S.), said:

> "In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, it has no authority to render judgment against the defendant."

See also *In re Bonner*, 151 U. S. 242, 38 L. Ed. 149, 14 Sup. Ct. Rep. 323.

Under the above authorities, therefore, we submit that petitioners' rights to due process of law, under the Fourteenth Amendment to the Federal Constitution, were denied by the entry of judgment by the trial court, and its affirmance by the appellate court.

POINT D.

Petitioners were denied due process of law, in that they were denied equal protection of the law.

Petitioners filed a Motion for New Trial and in Arrest of Judgment, (R. 141) in the Supreme Court of Mississippi, on the theory that no opportunity had been afforded for filing same in the lower court. The motion and affidavits in support thereof, revealed that petitioners were sentenced one night, after which they were carried to a jail in an adjoining county; and that early the next morning the court adjourned.

Under Mississippi practice, every person is given the right to make motion for a new trial; but according to the circumstances in this case, petitioners were deprived of this right. Had the opportunity been afforded, and had counsel appointed by the court taken advantage thereof,

the technicality on which the Supreme Court relied in affirming the case, on original appeal, would probably have been swept away.

While the right of making motion for a new trial is not essential to due process of law, yet if this privilege be allowed to some persons and not to all persons similarly situated, such deprivation of the right to make the motion is equivalent to denial of due process of law, for due process of law and the equal protection of the laws are secured only when—

> "* * * the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of the government." 152 U. S. 377, at page 382.

For the errors of the trial court in failing to control its sittings and adjournments so as to afford petitioners a like opportunity with others similarly situated, to make a motion for a new trial, we think reversal must follow:

> "Surely it is better that justice travel with a leaden foot, rather than that she should walk roughshod over the constitutional rights of citizens, to be equal one with another before the law."
>
> *State* v. *Guerringer*, 265 Mo. 408, 178 S. W. 65, at page 418.

Point E.

The decision of the Supreme Court of Mississippi is, itself, a denial of due process of law.

In the case of *Snyder* v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330, the Supreme Court of the United States defined the limits within which a state may regulate the procedure of its courts, in consonance with due process of law, as required by the Fourteenth Amendment to the Federal Constitution.

On page 105 of its opinion (291 U. S.), the Court said:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Twining* v. *New Jersey,* 211 U. S. 78, 106, 111, 112; *Rogers* v. *Peck,* 199 U. S. 425, 434; *Maxwell* v. *Dow,* 176 U. S. 581, 604; *Hurtado* v. *California,* 110 U. S. 516; *Frank* v. *Mangum,* 237 U. S. 309, 326; *Powell* v. *Alabama,* 287 U. S. 45, 67."

In the instant case, the Supreme Court of Mississippi attempts to defeat the right of petitioners, defendants in the trial court, to a fair and impartial trial, and this by a mere rule of procedure.

As we have previously stated, the only evidence of any consequence, introduced by the State against these petitioners was the so-called confessions, (See opinions, R. 135, 175-176) illegally obtained by the State, and fraudulently introduced (R. 41-78), and in denial of rights under the Constitution of the State of Mississippi,

In its Opinion on Suggestion of Error, in this cause (R. 166), the Supreme Court of Mississippi admits the illegality of the so-called confessions, under the Constitution of the State of Mississippi, in that they were forced self-incrimination (R. 168); the court expresses its horror of the manner in which the statements were extorted (R. 173), but in spite of these facts the court rules that because no motion to exclude was made by petitioners after it became apparent that said statements had been extorted by violence, that petitioners waived all right to charge the admission of said evidence as error, both under the Constitution of the State of Mississippi, and the due process clause of the Fourteenth Amendment to the Federal Constitution. (R. 168-169.)

In view of the settled law that waiver is the deliberate abandonment of a known right; in view of the further fact that petitioners objected to the so-called confessions, when they were first introduced, on the ground that they were not free and voluntary (R. 35, 41); that the whole defense was predicated upon a denial of the truth of said statements, and an exposition of the shameful and hideous manner in which they were extorted, it is inconceivable to us that the doctrine of waiver is here correctly applied.

Further than this, such waiver, if attempted, would be void as against public policy. Under the law petitioners could not waive their objection to the use by the state of deliberate fraud. *Coppell* v. *Hall,* 7 Wall. 542, 19 U. S. (L. Ed.) 244; *Motor Contract Co.* v. *Van Der Volgen,* 162 Wash. 449, 298 Pac. 705, 79 A. L. R. 39.

And certainly they could not waive their objection to a fraud which, on their trial, denied to them fundamental rights, and thus secured their conviction and sentence of death.

On this point the Supreme Court of the United States, in *Hopt* v. *Utah,* 110 U. S. 574, 28 L. Ed. 262, at page 579 of the opinion, 110 U. S., used the following language:

> "The natural life, says Blackstone 'Cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused; much less by his mere failure, when on trial and in custody to object to unauthorized methods."

But sweeping all argument as to waiver aside, the State of Mississippi, in its destruction of petitioners' fundamental rights, likewise destroyed the validity of their trial. *Mooney* v. *Holohan, supra.* Because of the fraud of the State the binding effect of the whole proceeding against these petitioners was totally vitiated and destroyed; and under these circumstances the waiver of petitioners, if it can properly be said that there was one, was of no more effect than the illegal and void proceedings which occurred prior thereto.

We submit, therefore, that it is apparent that any rule of procedure adopted by the Supreme Court of Mississippi, which serves as a device by which the court may ignore the denial in the lower court of those fundamentals essential to due process of law, is so arbitrary and unjustifiable a denial of essential justice, as to be within itself a denial of due process of law. And especially does this seem true in that the error in procedure was committed by counsel appointed by the court at a time, and under circumstances, which made adequate representation impossible. *Klatsky* v. *Hatch,* 157 N. Y. S. 878.

VII.

Conclusion.

In conclusion petitioners submit that under the facts, and the law, as hereinbefore set out, they have been deprived of their rights to due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution, on their trial, in the Circuit Court of Kemper County, Miss., and on their appeal to the Supreme Court of the State of Mississippi.

Petitioners, therefore, appeal to this Honorable Court for the protection of their rights, as citizens of the United

States, under the Constitution of the United States, by the issuance from this court of writ of certiorari, addressed to the Supreme Court of Mississippi, in order that this court may consider this cause on the merits, and that, thereupon, final justice may be done.

Respectfully submitted,

J. MORGAN STEVENS,
EARL BREWER,
WILLIAM H. HEWITT,
Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 301

ED BROWN, HENRY SHIELDS and YANK ELLINGTON, Petitioners,

versus

STATE OF MISSISSIPPI

STATEMENT AND BRIEF FOR PETITIONERS

J. MORGAN STEVENS,
EARL BREWER,
WILLIAM H. HEWITT,
Counsel for Petitioners.

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In the Supreme Court of the United States

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ED BROWN, HENRY SHIELDS and YANK ELLINGTON, Petitioners,

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STATE OF MISSISSIPPI

STATEMENT AND BRIEF FOR PETITIONERS

B.

REFERENCE TO OPINIONS, SUPREME COURT OF THE STATE OF MISSISSIPPI

The majority opinion of the Supreme Court of Mississippi, (R. 127) ..... Miss....., 158 So. 339, was rendered January 7, 1935.

The dissenting opinion, by Justice Anderson, of the Supreme Court of Mississippi, (R. 135)..... Miss....., 158 So. 343, was rendered January 7, 1935.

The majority opinion of the Supreme Court of Mississippi, on Suggestion of Error, (R. 166)..... Miss....., 161 So. 465, was rendered April 29, 1935.

The dissenting opinion on Suggestion of Error, delivered by Justice Griffith, Anderson, J., concurring (R. 173)..... Miss....., 161 So. 470, was rendered April 29, 1935.

C.

STATEMENT OF JURISDICTION.

1. The date of the judgment to be reviewed is April 29, 1935. (R. 179).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 of the Judicial Code, as amended by Act of February 13, 1925; 43 Statutes at Large 937, Section 344 U. S. C. A., Title 28.

3. In their Suggestion of Error, filed in the Supreme Court of the State of Mississippi (R. 138), petitioners specially set up and claimed rights and privileges accorded to them under the Constitution of the United States, said rights and privileges being in relation to due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution.

Petitioners asserted, in said Suggestion of Error, as they now represent to this Honorable Court, that their Constitutional right to due process of law, in their trial for murder, by the Circuit Court of Kemper County, Miss., and on appeal to the Supreme Court of Mississippi, had been violated by the State of Mississippi in the following particulars:

(a) By the knowing use, on the part of the State, as confessions, of statements illegally obtained from petitioners, through force and violence, by officers of the State. (R. 139, 140.)

(b) By the denial to petitioners, in reality, of representation by counsel. (R. 140.)

(c) By the judgment of the trial court, and its affirmance by the Supreme Court of Mississippi, in that the trial court had lost jurisdiction to enter said judgment, because of the denial of due process of law to petitioners, in the trial of said cause. (R. 140.)

4. In its Opinion on Suggestion of Error (R. 166), dissented to by Justices Griffith and Anderson (R. 173), the Supreme Court of the State of Mississippi considered the Federal questions therein raised and overruled same, thereby establishing and confirming the jurisdiction of this Honorable Court to review the proceedings herein, and the judgment and opinions of the Supreme Court of Mississippi, insofar as same relate to a denial of due process of law, to petitioners, within the meaning of the Fourteenth Amendment to the Federal Constitution.

The following authorities are in point as to the jurisdiction of this Honorable Court to review the Federal questions raised herein:

Great Northern Ry. Company v. Sunburst Oil and Refining Company, 53 Sup. Ct. Rep. 145, 287 U. S. 358, 77 L. Ed. 360;

Nickey v. State of Mississippi, 54 Sup. Ct. Rep. 743, 78 L. Ed. 1323, 292 U. S. 393;

Consolidated Turnpike Co. v. Norfolk, etc., R. Co., 228 U. S. 326, 33 Sup. Ct. Rep. 510, 57 L. Ed. 857;

Atchison, etc. R. Co. v. Harold, 241 U. S. 371, 36 Sup. Ct. Rep. 665, 60 L. Ed. 1050;

San Jose Land, etc. Co. v. San Jose Ranch Co., 23 Sup. Ct. Rep. 487, 189 U. S. 177, 180, 47 L. Ed. 765;

Mallet v. North Carolina, 181 U. S. 589, 21 Sup. Ct. Rep. 730, 45 L. Ed. 1015.

5. Further, there is no State question sufficient to support the decision of the Court, to the exclusion of the Federal question involved.

D.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The question involved in this cause is whether petitioners received the benefit of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, in their trial for murder, in the Circuit Court of Kemper County, Miss., and on their appeal to the Supreme Court of the State of Mississippi, from the judgment of said court, and sentence of death imposed therein.

Final judgment has now been entered against these petitioners by the Supreme Court of the State of Mississippi, the court of last resort in this state.

Petitioners, three ignorant negroes, (R. 126, 39, 51, 112) were indicted Wednesday, April 4, 1934, (R. 1) at an extension of the March term of the Circuit Court of Kemper County, Mississippi, (R. 164) for the murder of a white planter, (R. 77, 66, 67) Raymond Stewart, whose death occurred, (R. 8, 11) in said county on Friday of the week previous. (R. 6, 10.)

On a date not directly disclosed by the record, but, presumably, immediately following indictment, petitioners were arraigned, pled "Not Guilty" (R. 2) and

counsel was appointed by the court to defend them. (R. 54). On the next day after indictment, April 5, 1934, petitioners were put on trial for their lives. (R. 3).

On said trial the state based its charge of murder on alleged confessions, which it offered as freely and voluntarily made by petitioners, (R. 25, 35, 37, 39), while confined in the Meridian (Lauderdale County) jail, (R. 25, 34, 38) for safe-keeping. (R. 23, 70).

At the request of petitioners' counsel a preliminary examination was had of Sheriff Adcock (R. 20) the first witness by whom the state sought to prove the confessions, to determine whether the confessions were free and voluntary. Said examination revealed that during the early part of the questioning petitioners held back, and refused to make a complete statement, (R. 23), but under pressure began to talk (R. 23-24) and were then constantly corrected by Adcock when their statements met with his disapproval. (R. 23-24.) The sheriff admitted hearing of a prior confession (R. 24) and that at this time one of the petitioners bore marks of physical mistreatment, which the negro informed him was the result of whippings (R. 24), but that he was not advised and did not inquire concerning the details. (R. 24.)

Petitioners' objection to the introduction of the purported confessions was thereupon overruled (R. 25) and the testimony of Sheriff Adcock, and others who were with him at the time of said statements, was then admitted over repeated objections (R. 25, 35, 41), after which the state rested its case. (R. 41).

Whereupon petitioners, in their own defense, testified that the alleged confessions were false (R. 43, 59, 66, 71) and procured by officers of the state, and others, by force and violence, enroute to, and in the Meridian jail. (R. 43, 58, 59, 71.) That they denied guilt until cruelly beaten (R. 43, 59, 70, 71) and threatened with death (R. 47) if necessary to coerce a confession; and that they were threatened with further punishment if they changed their story. (R. 60, 61, 55, 72).

That on the night following the whippings the petitioners were subjected to questioning by Sheriff Adcock of Kemper County and Sheriff Stevens of Lauderdale County, and certain other officers and persons, (R. 43, 59, 71) and that they repeated the stories they were forced to make under the lash because of fear of further punishment. (R. 60, 61, 55, 72).

The record shows that during the trial the scars and wounds of petitioners were plainly visible, and that the attention of the court and jury was directed thereto. (R. 43, 69, 72).

The state offered in rebuttal the testimony of a deputy sheriff, and certain others, who admitted that the negroes denied guilt until whipped. (R. 102, 106, 112, 113, 114).

An examination of the record will disclose that the only evidence of consequence, against petitioners, was the so-called "confessions." (See opinions, R. 135, 175-176).

After hearing the evidence, argument of counsel, and instructions of the court, the jury returned a verdict

of "Guilty" as to each of the petitioners; (R. 2-3) whereupon the court entered its judgment, and sentenced petitioners to be hung by the neck until dead. (R. 3).

From this judgment petitioners appealed to the Supreme Court of Mississippi (R. 125) assigning as the principal ground of error the admission of said incriminating statements, as purported confessions. (R. 127)

The Supreme Court affirmed the judgment of the lower court in the decision rendered by it on appeal, (R. 127), and entered its judgment, (R. 137) resetting the date for execution, a dissenting opinion being delivered by Justice Anderson. (R. 135).

Petitioners thereupon filed in the Supreme Court of Mississippi their Suggestion of Error, (R. 138), said Suggestion asserting the Federal questions with reference to denial of due process of law, in that they were convicted by the fraud of the State through its agents, they were denied counsel, the trial court possessed no jurisdiction to enter judgment, and they were denied equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

As an accompaniment to the Suggestion of Error, a Motion in Arrest of Judgment, and For a New Trial was filed; (R. 141) said Motion being filed in the appellate court, as stated therein, under the theory that no opportunity had been afforded in the lower court for filing same. Said Motion was supported by affidavits of petitioners (R. 149, 153, 157) and counsel (R. 146) appointed by the lower court to represent them in the trial; said affidavits setting forth the manner in which the alleged

confessions were coerced, and the further facts that counsel had no access to petitioners for sufficient time to allow preparation of the case, or to acquaint counsel with the facts.

The Suggestion of Error was overruled by the Court, and final judgment entered (R. 179). In its opinion on said Suggestion of Error, (R. 166) the court held, in regard to the Federal questions raised by petitioners, that immunity from self-incrimination is not essential to due process of law, within the meaning of the 14th Amendment to the Federal Constitution; and that failure to exclude confessions which were competent when admitted, after introduction of evidence tending to show their incompetence; in absence of request so to do, does not deny due process of law, within the meaning of the 14th Amendment to the Federal Constitution.

The court further held that the record does not disclose that counsel appointed by the court consciously failed to discharge any duty they owed appellants; and the court declined to consider the Motion in Arrest of Judgment and For New Trial, on the ground that said Motion would not lie in the Supreme Court, same being a court of appellate jurisdiction only.

A dissenting opinion was delivered by Justice Griffith, concurred in by Justice Anderson. (R. 173).

In its final judgment, the Supreme Court reset the date of execution of petitioners for June 6, 1935. (R. 179).

Pursuant to Petition for Stay of Execution, (R. 179) the Supreme Court of Mississippi entered its order

(R. 180) staying the execution of petitioners for a sufficient time to allow the presentation to this Honorable Court of Petition for Certiorari.

This Court granted petitioners' application for Writ of Certiorari, —— U. S. ——, October 14, 1935.

E.

SPECIFICATION OF ERRORS

1. The Supreme Court of the State of Mississippi erred in affirming the judgment of the trial court, and in entering its judgment herein, in that the State of Mississippi contrived the conviction of petitioners, in the trial court, by the knowing use, on the part of the State, as confessions, of statements illegally obtained from petitioners, through force and violence, by officers of the State; such use amounting to a denial of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of the State of Mississippi erred in affirming the judgment of the trial court, and in entering its judgment herein, in that petitioners were, in reality, denied representation by counsel, in the trial court, and hence were denied due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of the State of Mississippi erred in affirming the judgment of the trial court, and in entering its judgment herein, in that the trial court had lost jurisdiction to enter said judgment, in the trial of said cause, because of the denial of due process of law

to petitioners, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of the State of Mississippi erred in refusing to consider Motion in Arrest of Judgment, and for New Trial, filed therein, and in affirming the judgment of the lower court, in that no opportunity was afforded petitioners for filing said Motion in the lower court; thereby denying to petitioners due process of law, as provided by the Fourteenth Amendment to the Federal Constitution, in that they were denied equal protection of the law.

5. The Supreme Court of the State of Mississippi erred in entering its judgment herein, and in its decision of said cause, in that said decision and judgment are, within themselves, denials of due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution, in that through them the court denies to petitioners their fundamental rights.

ARGUMENT

The learned counsel for respondent had much to say in his brief opposing the petition for a writ of certiorari regarding the Motion in Arrest of Judgment and for a New Trial and the affidavits in support thereof filed herein. Especially did counsel object to the facts stated in the supporting affidavits contending that they were not properly a part of the record.

Therefore, the allegations contained in the aforementioned Motion and affidavits are omitted from the

statement of facts and argument herein, with the exception of Point IV which treats particularly with the denial of due process in regard to the said Motion.

POINT I

BY THE KNOWING USE ON THE PART OF THE STATE, AS CONFESSIONS, OF STATEMENTS ILLEGALLY OBTAINED FROM PETITIONERS, THROUGH FORCE AND VIOLENCE, PETITIONERS WERE DENIED DUE PROCESS OF LAW.

For the convenience of the Court, we quote the pertinent portion of Section 26 of the Mississippi Constitution:

> "In all criminal prosecutions the accused***** shall not be compelled to give evidence against himself; ****"

THE CHARGE OF MURDER WAS BASED ON AND SUPPORTED ONLY BY THE SO-CALLED CONFESSIONS. From a study of the record herein, it is readily seen that there is no evidence whatsoever to support a conviction, save the extorted confessions.

In this connection Justice Anderson in his dissenting opinion, *Brown et al vs. State,* ——Miss.——, 158 So. 343, said:

> "Leaving out the confessions, the evidence was wholly insufficient to sustain the conviction." (R. 135).

And again in the same opinion Justice Anderson said on this point:

> "Wipe out these confessions, and the court would have been forced to direct a verdict of not guilty. The court had staring it in the face this incompetent testimony without which there could be no conviction." (R. 136).

Justice Griffith said in this regard in his dissenting opinion, *Brown et al vs. State,* ——Miss.——, 161 So. 470:

> "The evidence upon which the conviction was obtained was the so-called confessions. Without this evidence a peremptory instruction to find for the defendants would have been inescapable." (R. 175-176).

THERE IS NO DOUBT BUT THAT THE SO-CALLED CONFESSIONS WERE OBTAINED BY FORCE AND VIOLENCE. In the trial court each of the petitioners testified that they steadfastly denied guilt until severely beaten.

Ed Brown, one of the petitioners, testified as follows: (R. 43).

> "Q. You heard Mr. Adcock and the sheriff of Lauderdale County, Mr. Stevens, and Preacher Stevens testify about the confession you made in Meridian in the jail, saying that you participated in this killing; tell the jury whether or not you told the truth at that time.
>
> A. No, sir I didn't tell the truth.

Q. Why did you tell something that was not true?

A. Mr. Cliff called me out of the jail Sunday evening—

Q. Who did?

A. Mr. Cliff Dial. He told me to come on out here, that he had heard I told that I killed Mr. Raymond. I come out of the jail house and I said: "I declare I didn't kill Mr. Raymond." He said: "Come on in here and pull your clothes off; I am going to get you." I said to the last that I didn't kill him. There was two more fellows about like that there, and they was whipping me. They had me benind across chairs kind of like that. I said I didn't kill him, and they said put it on him again, and they hit so I had to say: "Yes, sir." Mr. Cliff said: "Give it to me, and I will get it." He took it, and it had two buckles on the end. They stripped me naked and bent me over a chair, and I just had to say it; I couldn't help it."

The testimony of Henry Shields and Yank Ellington, the other two petitioners, was very similar in this regard (R. 59, 69-70).

Certain peace officers corroborated the statements made by the petitioners when they were put on the stand in rebuttal by the State. Mr. T. H. Nicholson, Marshal of the town of Scooba (R. 99) testified as follows: (R. 102).

"Q. Each of these three defendants had been beaten before the questions were propounded?

A. I don't know anything about Ellington. I hadn't seen him at the time.

Q. The defendants Ed Brown and Henry Shields had been whipped before the statements were obtained?

A. They had been whipped some, yes, sir."

Cliff Dial, a Deputy Sheriff, testified as follows: (R. 113).

"Q. Ed denied it at first, didn't he?

A. Yes, sir.

Q. He said he wasn't guilty?

A. Yes, sir.

Q. Shields denied it too?

A. Yes, sir, at first.

Q. What did you do to them then?

A. We kind of warmed them a little—not too much.

Q. They said then that they were guilty?

A. Yes, sir."

Chief Justice Smith, in his opinion overruling the Suggestion of Error, *Brown et al vs. State, supra,* said: (R. 173)

"Nothing herein said is intended to even remotely sanction the method by which these confessions were obtained."

Justice Griffith in his dissenting opinion, *Brown, et al vs. State, supra,* said: (R. 176)

"The defendants were put on the stand, and by their testimony the facts and the details thereof as to the manner by which the confessions were extorted from them were fully developed, and it is further disclosed by the record that the same deputy, Dial, under whose guiding hand and active participation the tortures to coerce the confessions were administered, was actively in the performance of the supposed duties of a court deputy in the courthouse and in the presence of the prisoners during what is denominated, in complimentary terms, the trial of these defendants. This deputy was put on the stand by the state in rebuttal, and admitted the whippings. It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, 'Not too much for a negro; not as much as I would have done if it were left to me.' Two others who had participated in these whippings were introduced and admitted it —not a single witness was introduced who denied it. *The facts are not only undisputed, they are admitted—and admitted to have been done by officers of the state,* in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the trial, including the State's prosecuting attorney and the trial judge presiding." (Italics ours).

These extorted statements which have been heretofore referred to as confessions are condemned by the Constitution and laws of Mississippi. Simmons v. State,

61 Miss. 243; Ellis v. State, 65 Miss. 44, 3 So. 188; Whitley v. State, 78 Miss. 255; 28 So. 852; Mackmaster v. State, 82 Miss. 459, 34 So. 156; Banks v. State, 93 Miss. 700, 47 So. 437; Johnson v. State, 107 Miss. 196, 65 So. 218; Whip v. State, 143 Miss. 757, 109 So. 697; Fisher v. State, 145 Miss. 116, 110 So. 361.

THIS ACTION ON THE PART OF AGENTS OF THE STATE IN SECURING AND USING THESE EXTORTED STATEMENTS WAS A DENIAL OF DUE PROCESS. It should be borne in mind that these alleged confessions were procured by men who are supposed to be peace officers and agents of the State and then were used by officers of the State to secure a conviction of petitioners.

This action on the part of the State constituted a double fraud. Not only did if offer illegal evidence in view of Section 26 of the Constitution of the State of Mississippi; but by introducing these statements obtained under duress, the State of Mississippi offered evidence essentially false and tainted further by the criminal manner in which the statements were secured.

This Court has repeatedly held that due process of law is denied by a state when prevented through the wrong of its officers and agents. The following language, in the case of *Mooney v. Holohan*, —— U. S.——, 79 L. Ed. 347, is peculiarly applicable:

> "It (due process of law) is a requirement that cannot be satisfied by mere notice and hearing if a State has contrived a conviction through the pretence of a trial which in truth is but used as a means

of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of the laws, may constitute state action within the purview of the Fourteenth Amendment."

On the ground of fraud, there is very little to choose between the act of the State, referred to in *Mooney v. Holohan, supra,* and the act of the State in the present case. The State of Mississippi, through its use, as confessions, of statements literally whipped, word for word, from petitioners, presented evidence a sfalse as perjury. The fraud in the two cases, as to the introduction of false testimony, is essentially the same.

In the instant case, however, the fraud of the State is aggravated by the infamous mistreatment, on the part of the State, which resulted in the alleged confessions.

In this connection this Court, in the case of *Ex Parte, Commonwealth of Virginia,* 100 U. S. 339, 25 L. Ed. 667, used the following language:

"We have said the prohibitions of the 14th Amendment are addressed to the State. They are: 'No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of

the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws.' They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

See also in this connection, Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Scott v. McNeal, 154 U. S. 34, 38 L. Ed. 896; Chicago B. & Q. R. R., 166 U. S. 226, 41 L. Ed. 979.

The following language in the case of *Weeks v. United States,* 232 U. S. 383, 58 L. Ed. 652 was quoted in the case of Cofer v. State, 152 Miss. 761, 118 So. 613:

"The tendency of those who execute the criminal laws of the country to obtain conviction by

means of unlawful seizures and enforced confessions * * * should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

We therefore submit that petitioners were denied due process of law by the fraud of the State in the securing and using of these enforced confessions.

POINT II.

PETITIONERS WERE DENIED DUE PROCESS OF LAW THROUGH DENIAL OF COUNSEL.

The right to a hearing as a basic element of due process has repeatedly been construed to include the right to the aid of counsel. This Court ruled very positively on this subject in the recent case of *Powell v. Alabama,* 287 U. S. 45, 77 L. Ed. 158. The right to aid of counsel has been repeatedly held to be no mere form or ceremony, but a substantial right, and thus a Court is bound to make an effective appointment of counsel, taking into consideration all of the circumstances.

In the instant case the record discloses the following facts in connection with the appointment of counsel and the necessity for same: That petitioners are ignorant pauper negroes (R. 126, 39, 51, 112). On April 4, 1934 they were indicted for murder. (R. 1). On April 5, 1934 they were put to trial for their lives (R. 3). On a date not directly disclosed by the record, but necessarily

in the interval of time between the indictment and trial. Petitioners were arraigned and counsel appointed by the Court to defend them. (R. 2, 50, 54).

In order to satisfy the requirement of due process of law, in view of the fact that these negroes are ignorant paupers, the trial court was under a positive duty of appointing them counsel at a time and under circumstances which would, in fact, allow the defense adequate preparation. This the Court did not do. It is apparent that counsel for petitioners had no real opportunity to prepare themselves for the trial of this cause. The element of time alone precluded them.

A careful study of the record in this case will reveal to any legal mind that the attorneys representing the petitioners were only half-heartedly going through the empty form of a trial and were not in truth and in fact attempting to protect the rights of these defendants.

In the case of *Powell v. Alabama, supra,* this Court used the following language:

> " * * * In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; *and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.* To hold otherwise would be to ignore the fundamental postu-

late, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' *Holden v. Hardy,* 169 U. S. 366, 42 L. Ed. 780, 18 S. Ct. 383, supra." (Italics ours.)

See also *People v. Winchester,* 352 Ill. 237, 245, 185 N. E. 580.

In view of the foregoing facts and authorities we submit that due process of law was denied these petitioners in that they were denied the aid of counsel.

POINT III.

PETITIONERS WERE DENIED DUE PROCESS OF LAW IN THAT THE TRIAL COURT POSSESSED NO JURISDICTION TO ENTER JUDGMENT.

In the case of *Powell v. Alabama, supra,* this court said:

"It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps *essential to the passing of an enforceable judgment,* and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law." (Italics ours.)

We have demonstrated in the two preceding points that one of the preliminary steps essential to an enforceable judgment is lacking in this cause in the denial

of counsel, and further, that the right of petitioners to a fair and impartial trail was violated by the State through its agents, in the procurement and use of extorted statements to obtain a conviction.

Certainly since deliberate fraud on the part of the State has been shown, resulting in the denial of fundamental rights to these petitioners, it must be conceded that petitioners were not accorded due process of law within the meaning of the Federal Constitution.

In view of the conduct of this cause, from its inception, the trial court was without authority to enter a binding judgment and its attempt so to do was a denial of due process of law. In this conection, we quote again from the case of *Powell v. Alabama, supra,* where this court employed the following language:

> "Mr. Justice Field, in an earlier case, *Galpin v. Page,* 18 Wall. 350, 368, 21 L. Ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' "

Again, as to the denial of a constitutional right of petitioners and as to its result and effect as to the validity of the hearing and the judgment of the court thereon, we refer this Court to the case of Nielsen, 131 U. S. 176, 33 L. Ed. 118, wherein it was said:

"In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. *It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law.* In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, *it has no authority to render judgment against the defendant.* This was the case in Ex parte Lange where the court had authority to hear and determine the cause, but we held that it had no authority to give the judgment it did. It was the same in the case of Snow; the court had authority over the case, but we held that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision, securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment." (Italics ours.)

See also In re Bonner, 151 U. S. 242, 38 L. Ed. 149.

In addition to this, we have called the attention of the Court, supra, to the fact that the judgment herein is supported solely upon illegal evidence. On this point, the Oklahoma Court, in *McRae v. State,* 8 Okla. CR. 483, after quoting the due process clause from the Fourteenth Amendment said:

"Under this provision no state or court has the right to deprive any person of life, liberty or property except in a lawful manner and upon lawful evidence. It is true that the admission of illegal testimony does not necessarily deprive a defendant of due process of law, because the other testimony in a case might show that it did not affect the results; but where illegal evidence is admitted which is material in its character and which goes directly to the question at issue, and where the record shows that such evidence reasonably contributed to a verdict of guilty, then such a conviction cannot be said to have been obtained by due process of law. This is the condition of the record now before us. The hearsay evidence admitted was material and directly involved the pivotal points in the case, and without this testimony the jury might well have returned a verdict of acquittal. We cannot, therefore, say that the introduction of this evidence was harmless error." Quoting from the syllabi.

In the case of *Twining v. New Jersey*, 211 U.S. 78, 53 L. Ed. 97, this Court declined to hold that forcing a defendant to make a certain statement was in itself a denial of due process of law where the Constitution and Statutes of a state did not provide immunity from self-incrimination. The Court said:

"Salutary as the principle (protection against self-incrimination) may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws . . . . . It has no

place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administartion of the law. *It should, must, and will be rigidly observed where it is* secured by specific constitutional safeguards." (Italics ours.)

Justice Grifith, in this cause, ... Miss....., 161 So. 470 (R. 173) as to the entering of the judgment herein by the Supreme Court of Mississippi said:

"The Scottsboro cases are models of correct constitutional procedure as compared with this now before the Court. In fundamental respects, it is no better than the case reviewed in *Moore v. Dempsey*, 261 U. S. 86, 67 L. Ed. 543, wherein the formal court procedure was without defect, but the judgment was vitiated by the substance of what actually lay behind it.

"It may be that in a rarely occasional case which arouses the flaming indignation of a whole community, as was the case here, we shall continue yet for a long time to have outbreaks of the mob or resorts to its methods. But if mobs and mob methods must be, it would be better that their existence and their methods shall be kept wholly separate from the courts; that there shall be no blending of the devices of the mob and of the proceedings of the courts; that what the mob has so nearly completed let them finish, and that no court shall be adoption give legitimacy to any of the works of the

mob, nor cover by the frills and furbelows of a pretended legal trial the body of that which in fact is the product of the mob, and then by closing the eyes to actualities, complacently adjudicate that the law of the land has been observed and preserved.

Anderson, J., concurs in this dissent."

Therefore there is no doubt but what petitioners rights to due process of law were denied by the entry of judgment by the trial court and its affirmance by the appellate court.

POINT IV.

PETITIONERS WERE DENIED DUE PROCESS OF LAW IN THAT THEY WERE DENIED EQUAL PROTECTION OF THE LAW.

Petitioners filed a motion for a new trial and in arrest of judgment (R. 141) in the Superme Court of Mississippi on the theory that no opportunity had been afforded for filing same in the lower court. The motion and affidavits in support thereof revealed that immediately after the jury found these petitioners guilty, the trial judge thereupon consulted a calendar and sentenced them at night after which they were carried to a jail in an adjoining county, and that early the next morning, the Court adjourned for the term.

Under Mississippi practice, every person is given the right to make a motion for a new trial; but according to the circumstances in this case, petitioners were deprived of this right. Had the opportunity been afforded, and had counsel appointed by the court taken advantage

thereof, the technicality on which the Supreme Court relied in affirming the case, on original appeal, would probably have been swept away.

While the right of making motion for a new trial is not essential to due process of law, yet if this privilege be allowed to some persons and not to all persons similarly situated, such deprivation of the right to make the motion is equivalent to denial of due process of law, for due process of law and the equal protection of the laws are secured only when—

> "* * * the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of the government." *Duncan v. Missouri,* 152 U. S. 377, at page 382.

In the case of *Yick Wo v. Hopkins,* 118 U. S. 356, 30 L. Ed. 220, this Court used the following language, which appears to be applicable here:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson v. Mayor, etc. of New York,* 92 U. S. 259 (Bk. 23, L. Ed. 543); *Chy Luny v. Freeman,* 92 U. S. 275 (Bk. 23 L. Ed. 550); *Ex parte Va.* 100 U. S. 339 (Bk. 25

L. Ed. 676); *Neal v. Delaware*, 103 U. S. 370 (Bk. 26, L. Ed. 267); and *Soon Hing v. Crowley* (*supra*)."

In the case of *State v. Guerringer*, 265 Mo. 408, 178 S. W. 65, the Supreme Court of Missouri held that where sufficient time was not allowed in which to make a motion for a new trail, the accused was denied due process of law. In this case the jury returned a verdict of guilty in a capital case fifteen minutes before midnight on the last night of the term. The law required that a motion for a new trial be made before the end of the term. The Court held in this case that the failure of the defendant to have a like opportunity with others similarly situated to have a sufficient time to make a motion for a new trail constituted a denial of due process and such denial required a new trial.

In its opinion the Court said in the above case:

> "Moreover, the Constitution guarantees to defendant that he shall not be deprived of his property, or his liberty, or his life without due process of law. If he had no opportunity to file a motion for a new trial, as we must concede he did not have, but notwithstanding that his life be taken, it will have been taken without due process of law."

For the errors of the trial court in failing to control its sittings and adjournments so as to afford petitioners a like opportunity with others similarly situated, to make a motion for a new trial, we think reversal must follow:

> "Surely it is better that justice travel with a leaden foot, rather than that she should walk rough-

shod over the constitutional rights of citizens, to be equal one with another before the law." *State v. Gaerringer, supra.*

POINT V.

THE DECISION OF THE SUPREME COURT OF MISSISSIPPI IS ITSELF A DENIAL OF DUE PROCESS OF LAW.

In the case of *Snyder v. Mass.*, 291 U. S. 97, 78 L. Ed. 674, the Supreme Court of the United States defined the limits within which a State may regulate the procedure of its courts in consonance with due process of law as required by the Fourteenth Amendment to the Federal Constitution. In this case this court used the following language in this connection:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Twining v. New Jersey*, 211 U. S. 78, 106, 111, 112; *Rogers v. Peck*, 199 U. S. 425, 434; *Maxwell v. Dow*, 176 U. S. 581, 604; *Hurtado v. California*, 110 U. S. 516; *Frank v. Mangum*, 237 U. S. 309, 326; *Powell v. Alabama*, 287 U. S. 45, 67."

In the instant case, the Supreme Court of Mississippi attempts to defeat the right of petitioners, defendants in the trial court, to a fair and impartial trial, and this by a mere rule of procedure.

Why are these negroes sentenced to hang? Surely not for the murder of Raymond Stewart, for there is no competent evidence in the record against them on which a conviction for this crime could be based, but simply because their attorneys (who were appointed by the Court) failed to object to the extorted confessions in the proper form of words at precisely the proper stage of the proceedings. The Supreme Court of Mississippi based its affirmance of this case on the original appeal on the fact that counsel for petitioners did not move to exclude the admittedly incompetent confessions after their introduction.

Can this error in procedure of indifferent counsel prejudice the substantial rights of these petitioners who, despite the fact they were ignorant, illiterate "cornfield" negroes took the stand (and not having legal training or being cognizant of technical rules of procedure) with all the earnestness of their souls, did all in their power to object and to move to exclude the illegal and incompetent? And all the time, the negroes were moving to exclude in the only way they knew how, their bodies were also pleading (the marks of the rope and lash were visible to all who gazed upon them) to the Court not to allow these purported confessions, so brutally extorted to be used against them.

But counsel contends that when the facts as to the involuntary nature of the confessions became so plain as no longer to be denied that then the duty devolved upon petitioners to move to exclude the testimony, or else they were helpless to protect themselves from the obvious fraud. This seems to us to be quibbling of the

utmost insincerity. The whole defense in this case was based upon a denial of the legality of these confessions. The means by which they were extorted were laid bare before the Court and jury in all their hideousness. They were repeatedly objected to, but no precise motion to exclude was made. However, no one could have been deceived as to the wishes of the petitioners with respect to these so-called confessions. Yet the Supreme Court of Mississippi attempts to defeat the right of petitioners to a fair and impartial trial and this by a mere rule of procedure. A conviction thus obtained by illegal evidence is no triumph for justice and does not tend to uphold the majesty of the law.

In its Opinion on Suggestion of Error, in this cause (R. 166), the Supreme Court of Mississippi admits the illegality of the so-called confessions, under the Constitution of the State of Mississippi, in that they were forced self-incrimination. (R. 168); the court expresses its horror of the manner in which the statements were extorted (R. 173), but in spite of these facts the court rules that because no motion to exclude was made by petitioners after it became apparent that said statements had been extorted by violence, that petitioners waived all right to charge the admission of said evidence as error, both under the Constitution of the State of Mississippi, and the due process clause of the Fourteenth Amendment to the Federal Constitution. (R. 168-169.)

In view of the settled law that waiver is the deliberate abandonment of a known right; in view of the further fact that petitioners objected to the so-called confessions, when they were first introduced, on the

ground that they were not free and voluntary (R. 35, 41); that the whole defense was predicated upon a denial of the truth of said statements, and an exposition of the shameful and hideous manner in which they were extorted, it is inconceivable to us that the doctrine of waiver is here correctly applied.

Further than this, such waiver, if attempted, would be void as against public policy. Under the law petitioners could not waive their objection to the use by the state of deliberate fraud. *Coppell v. Hall,* 7 Wall, 542, 19 U. S. (L. Ed.) 244; *Motor Contract Co. v. Van Der Volgen,* 162 Wash. 449, 298 Pac. 705, 79 A. L. R. 39.

And certainly they could not waive their objection to a fraud which, on their trial, denied to them fundamental rights, and thus secured their conviction and sentence of death.

But sweeping all argument as to waiver aside, the State of Mississippi, in its destruction of petitioners' fundamental rights, likewise destroyed the validity of the trial. *Mooney v. Holohan, supra,* and *In re Nielsen, supra.* Because of the fraud of the State the binding effect of the whole proceeding against these petitioners was totally vitiated and destroyed; and under the circumstances the waiver of petitioners, if it can properly be said that there was one, was of no more effect than the illegal and void proceedings which occured prior thereto.

We submit, therefore, that it is apparent that any rule of procedure adopted by the Supreme Court of Mississippi, which serves as a device by which the court

may ignore the denial in the lower court of those fundamentals essential to due process of law, is so arbitrary and unjustifiable a denial of essential justice, as to be within itself a denial of due process of law. And especially does this seem true in that the error in procedure was committed by counsel appointed by the court at a time, and under circumstances, which made adequate representation impossible. *Klatsky v. Hatch,* 157 N. Y. S. 878.

CONCLUSION

We conclude therefore, with deference, that under the facts and the law as hereinbefore set out that petitioners have been deprived of their right to due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States on their trial in the Circuit Court of Kemper County and on their appeal to the Supreme Court of the State of Mississippi, and we respectfully ask that the judgment of the Supreme Court of Mississippi be reversed.

Respectfully submitted,

J. MORGAN STEVENS,
EARL BREWER,
WILLIAM H. HEWITT,
Counsel for Petitioners.

Three weeks service and filing of this brief is hereby expressly waived. This the 28th day of December, 1935.

GREEK L. RICE, Attorney General
W. D. CONN, JR., Asst. Atty. General
Counsel for Respondent.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 301

ED BROWN, HENRY SHIELDS AND
YANK ELLINGTON,

Petitioners,

versus

THE STATE OF MISSISSIPPI.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI.

GREEK L. RICE,
Attorney General of Mississippi,
WILLIAM DOW CONN, JR.,
Assistant Attorney General of Mississippi,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 301

ED BROWN, HENRY SHIELDS AND YANK ELLINGTON,

Petitioners,

versus

THE STATE OF MISSISSIPPI.

I.

Preliminary Statement.

Petitioners, Ed Brown, Henry Shields and Yank Ellington, were tried and convicted in the Circuit Court of Kemper County, Mississippi, on an indictment charging them with murder, and sentenced to be hanged by their necks until they, and each of them, were dead. They appealed to the Supreme Court of the State of Mississippi, where their conviction was affirmed, the decision of the Mississippi Supreme Court being reported in 158 So. 339, but not yet officially reported (R. 127, *et seq.*). Thereafter, petitioners filed a Suggestion of Error to the decision of the court (R. 138), and the court overruled that suggestion, its decision in this respect being reported in 161 So. 465,

but not yet officially reported (R. 166, *et seq.*). The petitioners have applied for writ of certiorari to bring before this Court for review the deciison of the Mississippi Supreme Court in response to the suggestion of error.

II.

Statute Relied on by Petitioners.

Petitioners base their right to a writ of certiorari upon the provisions of Section 237 of the Judicial Code, as amended by Act of February 13, 1925; 43 Statutes at Large 937, Section 344 U. S. C. A., Title 28, particularly that part of same which provides that it shall be competent for this Court, by certiorari, to require that there be certified to it for review and determination, any cause wherein a final judgment has been rendered or passed by the highest court of a state,

> "where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States;"

III.

Nature of Questions Raised by Petition.

In the main, petitioners rely upon two major propositions: (a) that the use of confessions by the state against petitioners at the time of their trial were extorted, and such use amounted to a deprivation of due process of law; and (b) that they were denied, in reality, representation by counsel to protect their interests at the trial. All other propositions advanced by petitioners are corollaries of the two foregoing main ones.

A. *The Confessions.*

At the time of the trial the state offered certain confessions alleged to have been made by petitioners, acknowledging guilt of the crime charged against them. When they were offered in evidence, the court required the jury to retire while it determined the competency of these confessions (R. 21). At this preliminary inquiry into the competency and admissibility of these confessions, the testimony showed that they were freely and voluntarily made (R. 21, *et seq.*). The petitioners, at this preliminary inquiry, presented no testimony to show that the confessions were otherwise. Thereupon, the trial judge held the confessions competent and admissible. The jury was returned to the box, and the confessions were related to it (R. 25). After the state had rested its case, the petitioners (defendants in the trial court), took the witness stand and testified in such a way as to make the competency of these confessions questionable. But, after their testimony was in, they thereafter made no motion to exclude, or resorted to any form of procedure calculated to require the trial judge to again pass upon the competency of these confessions.

Upon appeal to the Mississippi Supreme Court, the judgment of the trial court was affirmed, the court, as will be hereinafter pointed out, following established rules of procedure in affirming it (R. 127, *et seq.*).

It will therefore be seen that petitioners here base their right to a review under the statute above referred to upon the ground that the trial court erred in admitting evidence against them, and that the Supreme Court erred in upholding this ruling, so far as the confessions are concerned.

Decisions Showing what Necessary to be Done to Entitle Review Under Statute.

In order to give this Court jurisdiction under the statute relied on by petitioners, it must affirmatively appear that some title, right, privilege or immunity, under the Constitution of the United States, was specially set up or claimed in the court below. In the case sought to be reviewed here, no such claim was made in the trial court, nor in the Supreme Court of the State of Mississippi when the case was originally decided, but only on "Suggestion of Error," a suggestion filed by counsel that the court erred in its decision, itself in the nature of a re-argument after the court had decided the case on appeal. Injection of a "federal question" into the case came as an afterthought of counsel, and should be treated as such.

Spies v. *Illinois,* 123 U. S. 131, 181;
Baldwin v. *Kansas,* 129 U. S. 52;
Miller v. *Texas,* 153 U. S. 535, 538;
Brooks v. *Missouri,* 124 U. S. 394;
Brown v. *Massachusetts,* 144 U. S. 573;
Jacobi v. *Alabama,* 187 U. S. 133;
Caldwell v. *Texas,* 137 U. S. 692, 698;
Leeper v. *Texas,* 139 U. S. 462, 467.

The mere assertion that a federal question has been raised does not give this Court jurisdiction. The record must present such a question substantial in character and properly raised below.

Sugarman v. *United States,* 249 U. S. 182;
Zucht v. *King,* 260 U. S. 174;
Corrigan v. *Buckley,* 271 U. S. 323, 329.

This Court has held that a party is not entitled to a review here upon the ground that a state court has erred in admitting confessions or other evidence against them.

Barrington v. *Missouri*, 205 U. S. 483, 485, 486;
Ensign v. *Pennsylvania*, 227 U. S. 592;
Los Angeles Milling Company v. *Los Angeles*, 217 U. S. 217, 226.

The Federal Constitution does not guarantee immunity from self-incrimination, so far as the state courts are concerned.

Ensign v. *Pennsylvania*, 227 U. S. 592, 597;
Barron v. *Baltimore*, 7 Pet. 243;
Spies v. *Illinois*, 123 U. S. 131, 166;
Brown v. *New Jersey*, 175 U. S. 172;
Barrington v. *Missouri*, 205 U. S. 483;
Twining v. *New Jersey*, 211 U. S. 78, 93.

The State of Mississippi is free to regulate its own methods of procedure, as long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution, and the procedure adopted by the State of Mississippi does not run foul of the Fourteenth Amendment because another method may seem to be fairer and wiser or to give a surer promise of protection to the prisoner at the bar.

Jordan v. *Massachusetts*, 225 U. S. 167, 174, 32 Sup. Ct. Rep. 651, 56 L. Ed. 1038;
Twining v. *New Jersey*, 211 U. S. 78, 106, 111, 112;
Allen v. *Georgia*, 166 U. S. 138, 140;
Felts v. *Murphy*, 201 U. S. 123;
Rogers v. *Peck*, 199 U. S. 425, 434, 26 Sup. Ct. Rep. 87, 50 L. Ed. 256;
Frank v. *Mangum*, 237 U. S. 309;
Garland v. *Washington*, 232 U. S. 642, 645, 34 Sup. Ct. Rep. 456, 58 L. Ed. 772;

Ong Chang Wing v. *United States,* 218 U. S. 272, 279, 280, 31 Sup. Ct. Rep. 15, 54 L. Ed. 1040;
Snyder v. *Massachusetts,* 291 U. S. 97, 105, 54 Sup. Ct. Rep. 330, 90 A. L. R. 575, 78 L. Ed. 674;
Maxwell v. *Dow,* 176 U. S. 581, 604;
Hurtado v. *California,* 110 U. S. 516;
Powell v. *Alabama,* 287 U. S. 45, 67.

If the confessions had been erroneously admitted in evidence, there would have been no denial of due process of law.

Jones v. *Buffalo Creek Coal & Coke Co.,* 245 U. S. 328;
Central Land Co. v. *Laidley,* 159 U. S. 103;
Bonner v. *Gorman,* 213 U. S. 86;
Corrigan v. *Buckley,* 271 U. S. 323;
American Railway Express Co. v. *Kentucky,* 273 U. S. 269.

Petitioners Rely on Matters Aliunde the Record.

Petitioners rely principally upon the matters and things set up in the pleading which they captioned: "Motion in Arrest of Judgment and for New Trial" (R. 141, *et seq.*), which, together with the *ex parte* affidavits accompanying it, was filed in the Supreme Court of Mississippi, after the decision of that court on the merits of the case, and while a "Suggestion of Error" was pending there. These matters and things are not properly before this Court, and were not properly before the Mississippi Supreme Court, as pointed out in its decision (R. 172).

A motion in arrest of judgment will not lie in the Supreme Court of the State of Mississippi. This was pointed out by the court in its decision of the case at bar on suggestion of error (R. 172). As said in *State* v. *Joyner,* 148 Miss. 560, 114 So. 340:

> "A motion in arrest of judgment is confined to the record made in the trial. Its purpose is to search the

> record for errors made, not to make another and a different record. The matter complained of in the motion must be 'intrinsic, appearing on the face of the record, which would render the judgment, if given, erroneous or reversible.' 34 C. J., Sec. 154, page 31."

The *ex parte* affidavits of the three petitioners, as well as that of their counsel, being a part of this motion in arrest of judgment, could not be considered by the Mississippi Supreme Court, and consequently, under the decisions of this Court, hereinafter referred to, this Court cannot consider any of the allegations and charges of the motion and the exhibits thereto.

As to the motion for new trial which was made a part of the motion in arrest of judgment, counsel says, (Brief, page 23) that this was done "on the theory that no opportunity had been afforded for filing same in the lower court". That may have been counsel's reason for doing so, but, under the law of Mississippi, the trial court was the proper place for such procedure.

In *Pittman* v. *State,* 147 Miss. 593, 113 So. 348, the Mississippi Court held, with reference to the action of a trial judge on a motion for new trial after the term, at which a judgment was entered, had expired:

> "When the term of court was finally adjourned, the appellant's right to file a motion for a new trial ended, and any action of the trial judge in reference to such a motion, which was filed after the adjournment of the term, was of no effect, and is not properly a part of this record."

The court further said, in this same case:

> "The verdict in this case was returned into court in the presence of able associate counsel for the appellant, and the record does not show that counsel requested any delay in order to enable them to present a motion for a new trial or in any way indicated to the

court that they desired to present any such motion, and this being true, the appellant cannot now complain that the court adjourned the term when it had completed all business before it."

Along the same line is the case of *Carter* v. *State*, 147 Miss. 171, 113 So. 177, where the record did not show that any oral proof was offered to substantiate any of the grounds set up in the motion for new trial.

In *Carraway* v. *State*, 167 Miss. 390, 148 So. 340, the Mississippi Supreme Court held, in substance, that a motion for a new trial will not lie after the term, at which a judgment was rendered, has expired. The lone exception to this rule is in the case of fraud, actually perpetrated in securing the judgment itself.

Counsel cry "Fraud! Fraud!" in this case. But it must be kept steadily in mind that if there is or was fraud in this case, the place for the motion was in the trial court where proof could be taken *pro et con*, and not in the Supreme Court of Mississippi, a court of review only. So far as the Mississippi court and this Court are concerned, this motion and exhibits thereto are beside the question and not open to consideration here. If there is "fraud" in this case, the place to remedy that situation is in the Circuit Court of Kemper County, Mississippi, the trial court, since a judgment procured by fraud is open to attack at any time. See: *Carraway* v. *State*, *supra*.

Rules of Procedure in Mississippi.

That the decision of the Mississippi Supreme Court, in the case at bar, followed the well established rules of procedure adopted in that state, it is only necessary to refer to the decisions of that court.

The Supreme Court of Mississippi is one of review only. Section 146 of the State Constitution provides that:

"The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals."

The Supreme Court of Mississippi can only act on the record as made in the trial court, and will not go outside of the record made at the trial in reviewing a judgment of a trial court.

City of Pascagoula v. *Delmas,* 157 Miss. 619, 128 So. 743;
Akroyd v. *State,* 107 Miss. 51, 64 So. 936;
Bufkin v. *State,* 134 Miss. 116, 98 So. 455;
Lee v. *State,* 160 Miss. 618, 134 So. 185;
Fairley v. *State,* 152 Miss. 656, 120 So. 747;
Whit v. *State,* 85 Miss. 208, 37 So. 809.

In *Jackson* v. *State,* 163 Miss. 235, 140 So. 683, the Supreme Court of Mississippi reviewed the authorities and stated the rule with reference to the necessity and scope of objections to evidence in a trial court, so as to enable an appellant to base error thereon in the Supreme Court. The rule was not only stated, but the reasons therefor given, as:

> "It is true that on objection thereto, on the specific ground that it was not freely and voluntarily made, a confession should not be admitted in evidence until shown to have been so made, but no such specific objection was made in the court below, and cannot be made in this Court for the first time.
>
> "Except as hereinafter stated, error in the admissibility of evidence can be predicated only on an objection thereto, specifically pointing out the infirmity therein. * * * (citing cases).
>
> "This is one of the most elementary rules of appellate court procedure, and should not be departed from for three reasons: (1) Unless an objection to evidence specifically points out the alleged infirmity therein, the trial court cannot intelligently rule on its admissibility; (2) the party offering the evidence should, in all fairness, be apprised of the alleged infirmity therein, so that he may, if he can, remove it; and (3) in order

that the parties to the litigation may be confined in the Supreme Court to the questions litigated in the trial court, the Supreme Court being a court of appellate jurisdiction only."

On precisely the same proposition, see:

Howard v. *Town of Newton,* 108 Miss. 548, 67 So. 49;
Boatwright v. *State,* 143 Miss. 676, 109 So. 710.

Not only must the objection to evidence be specific, but the objector is held to the same ground of his objection as in the trial court. He cannot assign a new ground upon review.

Peters v. *State,* 158 Miss. 530, 130 So. 695;
Marley v. *State,* 109 Miss. 717, 69 So. 210;
Conwill v. *State,* 147 Miss. 118, 112 So. 868;
Duckworth v. *Town of Taylorsville,* 142 Miss. 440, 107 So. 666;
Boutwell v. *State,* 165 Miss. 16, 143 So. 479.

It was held, in *Peters* v. *State, supra,* that the statement of one ground of objection constituted a waiver of all others.

It is also a rule of practice in Mississippi that where there is no objection to evidence in the trial court, the Supreme Court has nothing to review, nor is a trial court held to have committed error where it has not been called upon to rule upon a proposition. In other words, the Mississippi Supreme Court will not hold a trial court in error, unless such a trial court has been called upon to act, and has acted erroneously.

Boutwell v. *State,* 165 Miss. 16, 143 So. 479;
Grady v. *State,* 144 Miss. 778, 110 So. 225;
Salmon v. *State,* 151 Miss. 539, 118 So. 610;
Dugan v. *State,* 151 Miss. 781, 119 So. 298;
Taylor v. *State,* 148 Miss. 621, 114 So. 390.

The only exceptions to the rule just stated relate to jurisdictional matters, as, for instance, where the indictment charges no crime whatsoever:

Pittman v. *State,* 107 Miss. 154, 65 So. 123;
Reed v. *State,* 171 Miss. 65, 156 So. 650;

or where venue was not proved:

Pickle v. *State,* 137 Miss. 112, 102 So. 4;
Dorsey v. *State,* 141 Miss. 600, 106 So. 827;
Waldrup v. *State,* 150 Miss. 302, 116 So. 432.

Indeed, the Mississippi court has held that it must raise jurisdictional questions arising on the record *ex mero motu.*

City of Lumberton v. *Frederick,* 164 Miss. 456, 143 So. 488.

As to the admission of confessions in evidence, the law of Mississippi is that an involuntary confession, for whatever reason involuntary, is not admissible. The law on this subject is treated in petitioners' brief and the law on it is conceded as set out therein on this particular point.

The competency of a confession is a matter for the trial court to pass upon, and the trial judge passes upon it as and when it is offered in evidence.

Simmons v. *State,* 61 Miss. 243;
Ellis v. *State,* 65 Miss. 44, 3 So. 188;
Lipscomb v. *State,* 75 Miss. 582, 23 So. 210;
Durham v. *State,* 158 Miss. 833, 131 So. 422;
Tyler v. *State,* 159 Miss. 223, 131 So. 417;
Whittaker v. *State,* 169 Miss. 517, 142 So. 474;
Smith v. *State,* 165 Miss. 462, 144 So. 233.

When a confession is offered in evidence, the party against whom it is sought to be used may, if he requests it, have the court determine its competency *vel non* in the absence of the jury.

Ellis v. *State,* 65 Miss. 44, 3 So. 188;
Lee v. *State,* 137 Miss. 329, 102 So. 296;

Randolph v. *State*, 152 Miss. 48, 118 So. 354;
Fletcher v. *State*, 159 Miss. 41, 131 So. 251;
Jackson v. *State*, 163 Miss. 235, 140 So. 683.

When a preliminary inquiry into the admissibility of a confession is requested and allowed by the trial court, it is the duty of the defendant, at that time, to show, if he can, the involuntary character of such alleged confession.

Perkins v. *State*, 160 Miss. 720, 135 So. 357;
Weatherford v. *State*, 164 Miss. 888, 143 So. 853;
Lee v. *State*, 137 Miss. 329, 102 So. 296;
Ellis v. *State*, 65 Miss. 44, 3 So. 188.

As pointed out by the Mississippi court in the decision of this case, the showing upon preliminary inquiry into the competency of the confessions satisfied that they were voluntary. There was nothing to the contrary shown by petitioners or anyone else. Afterwards, when petitioners were testifying on the merits, they testified in such a way as to throw doubt upon the competency of their confessions. But they never, from that time on, called upon the court by any procedural step which would have required it to again rule upon the competency of those confessions. The Mississippi Supreme Court, in reviewing this trial, merely followed old, well-established rules of practice and procedure, as set out hereinabove, and particularly the case of *Loftin* v. *State*, 150 Miss. 228, 116 So. 435, which was squarely in point, and affirmed the conviction, so far as the confessions were concerned.

Petitioners, in this proceeding, can only complain of their own failure to proceed along the orderly lines of procedure marked out by the courts of this State. As pointed out in the decision of the Mississippi court (R. 172):

> "The rules of procedure here applied are technical only in the sense that all such rules are, and what the

appellants (petitioners here) request is simply that they be excepted from the procedure heretofore uniformly applied to all litigants. This we cannot do. All litigants, of every race and color, are equal at the bar of this Court, and we would feel deeply humiliated if the contrary could be justly said."

B. *Alleged Denial of Counsel.*

Except as set out in the "Motion in Arrest of Judgment and for New Trial", and the *ex parte* affidavits attached thereto, and which, as pointed out above, have no place in this proceeding, there is nothing to show whether counsel who represented petitioners at the trial were appointed by the court, or employed by petitioners themselves, except the inference noted by petitioners as being deducible from certain testimony shown at the bottom of page 54 of the record before this Court.

In the case of *Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55, which is relied on exclusively by petitioners on this ground, it is distinctly set out by the court that the record disclosed the circumstances under which counsel was "appointed" by the court. From the record now before the Court in this case, there is nothing upon which to base an argument of denial of counsel unless we allow our imagination to run wild. The Mississippi court, in refusing this suggestion of error, said (Record court, in refusing this suggestion of error, said (R. 172):

"No request was made of the court to continue the case, to pass it to a later day, or to grant the appellants any further time for the preparation of their case.

"The attorneys who defended the appellants in the court below are able lawyers of extensive practice—veterans of many forensic conflicts; and the record does not disclose that they consciously failed to discharge any duty they owed the appellants."

Since there was nothing in the record properly before the Mississippi court, upon which it could review this alleged error, there is nothing which this Court can review.

Spies v. *Illinois*, 123 U. S. 131, 181;
Baldwin v. *Kansas*, 129 U. S. 52;
Miller v. *Texas*, 153 U. S. 535, 538;
Brooks v. *Missouri*, 124 U. S. 394;
Brown v. *Massachusetts*, 144 U. S. 573;
Jacobi v. *Alabama*, 187 U. S. 133;
Caldwell v. *Texas*, 137 U. S. 692, 698;
Mutual Life Insurance Co. v. *McGrew*, 188 U. S. 291.

C. *Alleged Fraud of State Agents.*

There is no analogy as between the facts of the case at bar and the facts of *Mooney* v. *Holohan* (U. S.), 79 L. Ed. (not yet officially reported). As aptly put by the Mississippi court (R. 170):

> "*Mooney* v. *Holohan*, L. Ed. Adv. Opinion, Vol. 79, p. 347, is cited and relied on by the appellants but its relevancy here is not apparent. There the charge was that Mooney was convicted on perjured evidence, known to be such by the prosecuting officer, who suppressed evidence, unknown to Mooney, in impeachment thereof. No charge, either of perjury, or the suppression of evidence, is here made. On the contrary, all of the facts as to the confessions being coerced were known to the appellants when they were offered and were provable by their own personal testimony."

This statement of the Mississippi court, which is sustained by the record which was before it, and which is now before this Court, is a complete answer to petitioners' claim. There is absolutely no showing of fraud, and no fraud was claimed in the Mississippi court until after the supreme court had decided the appeal on its merits. On suggestion of error, fraud was charged, but there is nothing

in the entire record, which is properly before the Court upon which a charge of fraud may be sustained. Under the decisions of this Court, above set out, since there was nothing before the Mississippi Supreme Court upon which this charge might be based, there is nothing upon which this Court can review this charge of fraud.

Conclusion.

With reference to the right of petitioners to have this Court review their conviction upon the ground that the use of extorted confessions against them constituted a denial of due process of law, the State of Mississippi submits:

(1) That petitioners are not entitled to a review by this Court, merely because the court may have ruled erroneously so far as the introduction of testimony was concerned;

(2) That mere rules of procedure are involved in this matter, and the State of Mississippi has the right to formulate and regulate its own methods of procedure, so long as they operate on all alike and do not interfere with the petitioners' day in court and their right to be heard—it not having been shown by the record that there has been any arbitrary exercise of any powers over petitioners, or that they have been treated any differently than any other defendant under the same circumstances; and

(3) That no title, right, privilege or immunity, under the Constitution of the United States, was specially set up or claimed in the trial court, nor was anything of this nature claimed until after the Mississippi Supreme Court had affirmed the conviction.

From an inspection of the record petitioners have placed before the Court, it will be seen that petitioners' whole case is irretrievably bound, top, side and bottom, upon the allegations of the "Motion in Arrest of Judgment and for

New Trial" and the *ex parte* affidavits attached to and forming a part thereof; and since, under the decisions of this Court, the Mississippi court could not take into consideration the matters and things alleged, this Court, sitting in review, can do no more. Upon the record now before this Court there is and has been no "Federal question" raised sufficient to entitle petitioners to a review here.

For the foregoing reasons, the State of Mississippi submits that petitioners have not brought their case within the provisions of the statute under which they seek a review, and that this Court should deny the writ prayed for because this Court, under the circumstances, has no jurisdiction in the premises.

Respectfully submitted,

THE STATE OF MISSISSIPPI, *Respondent*,

By GREEK L. RICE,

Attorney General of Mississippi,

WILLIAM DOW CONN, JR.,

Assistant Attorney General of Mississippi,

Counsel for Respondent.



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1935

ED BROWN, HENRY SHIELDS, and YANK ELLINGTON, Petitioners,

VS. **No. 301**

THE STATE OF MISSISSIPPI.

BRIEF OF RESPONDENT

GREEK L. RICE, Attorney General

WILLIAM DOW CONN, JR., and

WILLIAM H. MAYNARD, Assistant Attorneys General.

Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1935

ED BROWN, HENRY SHIELDS, and YANK ELLINGTON, Petitioners,

VS. **No. 301**

THE STATE OF MISSISSIPPI.

BRIEF OF RESPONDENT

HISTORY OF THE CASE

Ed Brown, Henry Shields and Yank Ellington were indicted at the March, 1934, Term of the Circuit Court of Kemper County, Mississippi, for the murder of Raymond Stuart, a human being. The indictment (R. 1) was filed with the Clerk of that Court on April 4th, 1934. They were arrested on the same day (R. 2) and brought into court. They were arraigned and entered pleas of "not guilty" (R. 2). They were tried jointly, the jury returning a verdict of "guilty as charged" as to each of them, such verdict making it mandatory upon the court to impose the death sentence (Sec. 1293, Mississippi Code of 1930). From the judgment entered on the verdict of the jury (R. 3, 4), the convicts appealed to the Supreme Court

of the State, Mississippi's highest court of appeals. This judgment was affirmed, five of the judges of the court concurring in the affirmance (R. 127 et seq.), with one dissenting. (R. 135 et seq.)

After the affirmance in the State Supreme Court, a Suggestion of Error was filed in that court by attorneys other than those who represented the petitioners in the trial court and in the Supreme Court on the original appeal (R. 138 et seq.).

Upon this Suggestion of Error, for the first time in the proceedings, Federal questions were asserted. This Suggestion of Error was overruled by the Court, four of the judges concurring therein (R. 166 et seq.) with two judges dissenting (R. 173 et seq.).

Thereupon, a petition for writ of certiorari was addressed to this Court, which was sustained, the order allowing it being filed on October 14, 1935.

PRELIMINARY STATEMENT OF THE CASE

In the main, the petitioners rely upon two major propositions: (1) that the use of extorted confessions against them by the state amounted to a denial of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States; and (2) that they were denied, in reality, representation by counsel, and thus denied due process of law within the meaning of that Amendment. There are three other as-

signments of error upon which argument is made here, but they, in effect, depend entirely upon the two main propositions above referred to.

From the arguments made here by petitioners, it will be seen that a detailed summary of all the facts is unnecessary for a proper understanding of them. However, respondent submits that the facts have been accurately drawn and presented in the opinion of the Mississippi Supreme Court, appearing at page 128 et seq. of the record now before this Court.

Such facts as are necessary for a proper understanding of the various contentions will be set out in connection with the argument thereon.

BRIEF OF THE ARGUMENT

POINT I.

THAT: PETITIONERS WERE DENIED DUE PROCESS OF LAW BY THE FRAUD OF THE STATE, THROUGH ITS AGENTS.

It is said that the use of confessions coerced from appellants by the State in the prosecution of this case constituted a double fraud: (1) that it violated Section 26 of the Constitution of the State of Mississippi, which provides that

> "In all criminal prosecutions the accused * * * shall not be compelled to give evidence against himself";

and, (2) that it violated the Fourteenth Amendment to the Federal Constitution, and particularly that clause of it which provides:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Mississippi Supreme Court held that no rights of appellants under the Constitution were infringed (R. 168). But, assuming, not conceding, that the confessions in this case were coerced, has this court the right, under the law, to review the action of the State courts in passing upon the admissibility of this evidence so far as it affects rights under the State's Constitution? This court has held that it has not that right, and has laid down the rule that when the highest court of a State has decided that proceedings in a State court have not infringed any rights of an accused guaranteed him by the State's Constitution, such decision cannot be reviewed by the United States Supreme Court.

Brown vs. New Jersey, 175 U. S. 172;

Barrington vs. Missouri, 205 U. S. 483;

Spies vs. Illinois, 123 U. S. 131 (181).

On the other hand, the State of Mississippi submits that there is nothing in the Federal Constitution which is infringed by the use in state courts of coerced confessions, even if we concede that the confessions in this case were

so coerced; or, stated in other words, the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution.

The Fifth and Fourteenth Amendments to the Federal Constitution are the ones dealing with the subject of "due process of law." The Fifth Amendment also provides that

> "no person * * * shall be compelled, in any criminal case, to be a witness against himself."

But it has been uniformly held by this court that the Fifth Amendment was not intended to limit the powers of the State Governments in respect to their own people, but to operate on the National Government alone. It regulates the procedure of the Federal Courts exclusively, and is not obligatory upon the several State of the Union.

Barrington vs. Missouri, 205 U. S. 483;

Ensign v. Pennsylvania, 227 U. S. 592;

Barron vs. Baltimore, 7 Pet. (32 U. S.) 243;

Spies vs. Illinois, 123 U. S. 131;

Livingston vs. Moore, 7 Pet. 469;

Fox vs. Ohio, 5 How. 410;

Smith vs. Maryland, 18 How. 71;

Withers vs. Buckley, 20 How. 84;

Pervear vs. Commonwealth, 5 Wall. 475;

The Justices vs. Murray, 9 Wall 274;

Edwards vs. Elliot, 21 Wall 532;

Walker vs. Sauvinet, 92 U. S. 90;

United States vs. Cruicshank, 92 U. S. 542;

Pearson vs. Yewdall, 95 U. S. 294;

Davidson vs. New Orleans, 96 U. S. 97;

Kelly vs. Pittsburg, 104 U. S. 78;

Presser vs. Illinois, 116 U. S. 252;

Brown vs. New Jersey, 175 U. S. 172;

The Fourteenth Amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress. But the Federal Courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a State applicable to all persons in like circumstances and conditions, and the Federal Courts should not interfere unless there is some abuse of law amounting to confiscation of property or deprivation of personal rights.

In *Twining vs. New Jersey*, 211 U. S. 78, this court observed:

> "The Fourteenth Amendment withdrew from the States powers theretofore enjoyed by them to an extent not yet fully ascertained, or rather, to speak more accurately, limited those powers and restrained their exercise. There is no doubt of the duty of this court to enforce the limitations

and restraints whenever they exist, and there has been no hesitation in the performance of the duty. *But whenever a new limitation or restriction is declared it is a matter of grave import, since, to that extent, it diminishes the authority of the State, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union.*"

In this same case (*Twining vs. New Jersey, supra*), this court, in discussing the privilege against self-incrimination, said: (113)

"Much might be said in favor of the view that the privilege (against self-incrimination) was guaranteed against state impairment as a privilege and immunity of National citizenship, but, as has been shown, the decisions of this court have foreclosed that view. There seems to be no more reason whatever, for straining the meaning of due process of law to include this privilege within it, because, perhaps, we may think it of great value. The States had guarded the privilege to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self government weakened by forced construction of the Federal Constitution. * * * * *

"* * * The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, *we think that the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution.*"

In *Snyder vs. Massachusetts,* 291 U. S. 97, the court said:

" * * * Consistently with that amendment (The Fourteenth), trial by jury may be abolished. Walker vs. Sauvinet, 92 U. S. 90; Maxwell vs. Dow, supra. (176 U. S. 581); N. Y. Central R. Co. vs. White, 243 U. S. 188, 208; Wagner Electric Co. vs Lyndon, 262 U. S. 226, 232. Indictments by a grand jury may give way to informations by a public officer. Hurtado vs. California, supra, (110 U. S. 516); Gaines vs. Washington, 277 U. S. 81, 86. *The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state.*

Twining vs. New Jersey, supra, (211 U. S. 78.)'

Since, from the foregoing dicisions of this court, it clearly appears that the Federal Constitution contains no guaranty against self-incrimination in the courts of a State, and that the privilege of exemption from compulsory self-incrimination may be entirely withdrawn by a State without infringing any provision of the Federal Constitution, it then remains to be seen whether, in the use of these confessions, these appellants have been subjected

to the orderly processes of the law in the trial of their case, or have been arbitrarily discriminated against.

How far, under the Fourteenth Amendment to the Federal Constitution, may a State go in setting up and regulating its own forms of procedure and practice?

In *Jordan vs. Massachusetts*, 225 U. S. 167, the Court quoted from its decision in the case of *Louisville & Nashville R. Co. vs. Schmidt*, 177 U. S. 230, 236, as follows: (176)

> " 'It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in State Courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity to defend. Iowa Central Railway vs. Iowa, 160 U. S. 389; Wilson vs. North Carolina, 169 U. S. 586.'
>
> "When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a state over its methods of procedure is substantially unrestricted by the due process clause of the Constitution.
>
> "Touching the power of the States over their procedure for the administration of their police

power, Mr. Justice Moody, in Twining vs. New Jersey, cited above, (175 U. S. 172), said:

> " 'The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands.' "

In *Allen vs. Georgia,* 166 U. S. 138, the facts in substance were that a convicted murderer, under death sentence, escaped pending an appeal to the State Supreme Court. The Supreme Court of Georgia, upon being advised that the convict was a fugitive, ordered his writ of error dismissed, unless he should surrender himself to custody or be re-captured within sixty day. At the expiration of the sixty days, the convict not having surrendered or been recaptured, his writ of error was finally dismissed. Subsequently, he was recaptured and obtained a writ of error to this court upon the alleged ground that the dismissal of his writ of error by the State Court under the circumstances was a denial of due process.

This court affirmed the action of the State Supreme Court and in the course of the opinion (140) said:

> "* * * * Without attempting to define exactly in what due process consists, it is sufficient to say that, if the Supreme Court of a

State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. *We might ourselves have pursued a different course in this case, but that is not the test.* The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

The foregoing quotation was set out and appoved in *Wilson vs. North Carolina*, 169 U. S. 586, 593.

In *Rogers vs. Peck*, 199 U. S. 425, the court said:

(434) "The reluctance with which this court will sanction Federal interference with a state in the administration of its domestic law for the prosecution of crime has been frequently stated in the deliverances of the court upon the subject. *It is only where fundamental rights, specially secured by the Federal Constitution, are invaded that such interference is warranted.* Ex Parte Reggel, 114 U. S. 642; In re Converse, 137 U. S. 624; Allen vs. Georgia, 166 U. S. 138; Hodgson vs. Vermont, 168 U. S. 262; Brown vs. New Jersey, 175 U. S. 172; In re Frederich, 149 U. S. 70:" * * * * *

Due process of law, guaranteed by the Fourteenth Amendment, does not require the State to

adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Louisville & Mashville Railroad Co. vs. Schmidt, 177 U. S. 230; Wilson vs. North Carolina, 169 U. S. 586."

In *Frank vs. Mangum*, 237 U. S. 309 (326), the court observed:

"As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, *and conducted according to the settled course of judicial proceedings as established by the law of the state*, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the Constitutional sense. Walker vs. Sauvinet, 92 U. S. 90, 93; Hurtado vs. California, 110 U. S. 516, 535; Andrews vs. Schwartz, 156 U. S. 272, 276; Bergemann vs. Backer, 157 U. S. 655, 659; Rogers vs. Peck, 199 U. S. 425, 434; Drury vs. Lewis, 200 U. S. 1, 7; Felts vs. Murphy, 201 U. S. 123, 129; Howard vs. Kentucky, 200 U. S. 164."

In this case (*Frank vs. Mangum*) the court held that the practice in Georgia whereby a defendant might waive his right to be present at the reception of the jury's ver-

dict "is a regulation of criminal procedure that is within the authority of the state to adopt."

And, in *Garland vs. Washington*, 232 U. S. 642, 645, the court said:

> "Due process of law, this court has held, does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Rogers vs. Peck, 199 U. S. 425, 435."

Again, in *Ong Chang Wing vs. United States*, 218 U. S. 272, the court said:

> (279) "This court has had frequent occasion to consider the requirements of due process of law as applied to criminal procedure, and, generally speaking, it may be said that if an accused has been heard in a court of competent jurisdiction, and proceeded against under the orderly processes of the law, and only punished after inquiry and investigation, upon notice to him, with an opportunity to be heard, and a judgment awarded within the authority of a constitutional law, then he has due process of law. Rogers vs. Peck, 199 U. S. 425, 435; Twining vs. New Jersey, 211 U. S. 78, and the cases therein cited."

In *Snyder vs. Massachusetts*, 291 U. S. 97, 105, this court said:

"The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Twining vs. New Jersey, 211 U. S. 78, 106, 111, 112; Rogers vs. Peck, 199 U. S. 425, 434; Maxwell vs. Dow, 176 U. S. 581, 604; Hurtado vs. California, 110 U. S. 516; Frank vs. Mangum, 237 U. S. 309, 326; Powell vs. Alabama, 287 U. S. 45, 67. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar. Consistently with that amendment, trial by jury may be abolished. Walker vs. Sauvinet, 92 U. S. 90; Maxwell vs. Dow, supra; N. Y. Central T. Co. vs. White, 243 U. S. 188, 208; Wagner Electric Co. vs. Lyndon, 262 U. S. 226, 232; Indictments by a grand jury may give way to informations by a public officer. Hurtado vs. California, supra; Gaines vs. Washington, 277 U. S. 81, 86. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state. Twining vs. New Jersey, supra. What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it. Twining vs. New Jersey, supra; Powell vs. Alabama, supra, pp. 68, 71; Holmes

vs. Conway, 241 U. S. 624. Cf. Blackmer vs. United States, 284 U. S. 421, 440."

The last paragraph of this decision (122) reads as follows:

"The Constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the people of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (Otis vs. Parker, 187 U. S. 606, 609), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

In *Maxwell vs. Dow*, 176 U. S., 581, 595, it is said:

"The states, so far as this amendment (The Fourteenth) is concerned, are left to regulate trials in their own courts in their own way."

In the concluding paragraph of this opinion, the court, in discussing the rule just quoted, said:

> "Under this construction of the amendment, there can be no just fear that the liberties of the citizen will not be carefully protected by the states, respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal Government *that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials*, whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. *These are matters which have no relation to the character of the Federal Government.* As was stated by Justice Brewer, in delivering the opinion of the court in Brown vs. New Jersey, 175 U. S. 172, the State has full control over the procedure of its courts, both in civil and criminal cases, *subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.*"

And, as stated in the case of *Chicago, R. I. & P. R. Co. vs. Cole*, 251 U. S. 54, 56, this court has sustained all state

laws statutory or judicially declared, regulating procedure, evidence and methods of trial, including denial of jury trial in both civil and criminal cases.

Consistent, then, with the foregoing decisions of this court, the State of Mississippi has adopted certain rules regulating the admission of evidence in the trial of cases in its courts, and certain of these rules, particularly with reference to the trial of criminal cases, so far as they relate to the situation presented here, will be now referred to.

The Mississippi Supreme Court, as provided by Section 146 of that State's Constitution, is one of review only. It is not a court of original jurisdiction. That Section of its constitution provides:

> "The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals."

That court acts only on the record as made in the trial court and will not go outside of the record made at the trial in reviewing a judgment.

City of Pascagoula vs. Delmas, 157 Miss. 619, 128 So. 743;

Akroyd vs. State, 107 Miss. 51, 64 So. 936;

Bufkin vs. State, 134 Miss. 116, 98 So. 455;

Lee vs. State, 160 Miss, 618, 134 So. 185;

Fairley vs. State, 152 Miss. 656, 120 So. 747;

Whit vs. State, 85 Miss. 208, 37 So. 809;

Error in the admissibility of evidence can be predicated only on an objection thereto specifically pointed out the infirmity therein.

Jackson vs. State, 163 Miss. 235, 140 So. 683;

Howard vs. Town of Newton, 108 Miss. 548, 67 So. 49;

Boatwright vs. State, 143 Miss. 676, 109 So. 710;

Error in the admission of evidence cannot be assigned and a review had in the absence of objections in the court below. In other words, the Mississippi Supreme Court will not hold a trial court in error, unless the trial court has been called upon, by objection to evidence, to rule, and has ruled erroneously.

Boutwell vs. State, 165 Miss. 16, 143 So. 479;

Grady vs. State, 144 Miss. 778, 110 So. 225;

Salmon vs. State, 151 Miss. 539, 118 So. 610;

Dugan vs. State, 151 Miss. 781, 119 So. 298;

Taylor vs. State, 148 Miss. 621, 114 So. 390.

Not only must the objection to evidence be specific, pointing out the alleged infirmity in it, but the objector is held to the same ground of his objection as in the trial court. He cannot assign a new ground of objection on review. This is in accord with the rule that the parties to the litigation are confined in the Supreme Court to the precise questions raised and litigated in the trial court, since the Supreme Court is one of appellate jurisdiction only.

Peters vs. State, 158 Miss. 530; 130 So. 695.

Marley vs. State, 109 Miss. 717, 69 So. 210;

Conwill vs. State, 147 Miss. 118, 112 So. 868;

Duckworth vs. Town of Taylorsville, 142 Miss. 440, 107 So. 668;

Boutwell vs. State, 165 Miss. 16, 143 So. 479.

With reference to the admission of confessions into evidence, the law of Mississippi is that an involuntary confession, if properly objected to, is inadmissible. But if no objection is registered to an incompetent confession, there is nothing of which an accused can complain. This is in strict accord with the general rules laid down above.

The competency of a confession is a matter for the trial court to pass upon, and the trial court passes upon it as and when it is offered in evidence, provided an objection is made.

Simmons vs. State, 61 Miss. 243;

Ellis vs. State, 65 Miss. 44, 3 So. 188;

Lipscomb vs. State, 75 Miss. 559, 23 So. 210;

Durham vs. State, 158 Miss. 833, 131 So. 422;

Tyler vs. State, 159 Miss. 223, 131 So. 417;

Whittaker vs. State, 169 Miss. 517, 142 So. 474;

Smith vs. State, 165 Miss. 462, 144 So. 233.

And, when a confession is offered in evidence, the party against whom it is sought to be used may, if he so

requests, have the court determine its competency *vel non* in the absence of the jury.

Ellis vs. State, 65 Miss. 44, 3 So. 188;

Lee vs. State, 137 Miss. 329, 102 So. 296;

Randolph vs. State, 152 Miss. 48, 118 So. 354;

Fletcher vs. State, 159 Miss. 41, 131 So. 251;

Jackson vs. State, 163 Miss. 235, 140 So. 683;

When a preliminary inquiry into the admissibility of a confession is requested and allowed by the trial court, it is the duty of the accused, at that time, to show, if he can, the involuntary character of such alleged confession.

Perkins vs. State, 160 Miss. 720, 135 So. 357;

Weatherford vs. State, 164 Miss. 888, 143 So. 853;

Lee vs. State, 137 Miss. 329, 102 So. 296;

Ellis vs. State, 65 Miss. 44, 3 So. 188;

If, when the state offers a confession in evidence, the accused requests and obtains a preliminary inquiry into its admissibility in the absence of the jury and at such preliminary inquiry allows the state to prove the voluntary character of same, without showing, or offering to show, that such confession was involuntary, the trial court will not be held to have erred in allowing the confession to be related to the jury. And if, during the subsequent phases of the case, no motion is made to exclude such confession after there might be sufficient evidence to make the vol-

untary character of it questionable, and no ruling called for which would require the trial judge to again pass upon the competency of such evidence, under the rules set out supra, there is nothing of which he can complain in the court of review.

Loftin vs. State, 150 Miss. 228, 116 So. 435.

This latter case (*Loftin vs. State*) is squarely in point with the case at bar, and is direct authority for the decision in the case at bar.

In the case at bar, as pointed out by the Mississippi Supreme Court in its decision, the showing upon the preliminary inquiry into the competency of the confessions satisfied that they were voluntary. There was nothing shown to the contrary by the prisoners or anyone else at this preliminary inquiry—which is required under the rules laid down above. Afterwards, when the prisoners were testifying on the merits of the case, they testified in such a way as to throw doubt upon the competency of their confessions, as related by state witnesses. But they never, from that time on, called upon the court by motion, or any other procedural step which required it to again rule upon the competency of this evidence in the light of the subsequent testimony. The Mississippi Supreme Court, in reviewing this trial, and in affirming the decision of the trial court, merely followed old, well established rules of practice and procedure, as set out above, and particularly the case of *Loftin vs. State, supra.*

After a confession has been held competent by the trial judge and it is allowed to go to the jury, the jury is

then entitled to have detailed to it the circumstances under which the confession was made. This is the rule in Mississippi, because there the jury is the sole judge of the credibility of witnesses and the weight to be given their testimony, and without proof of such circumstances the jury would be at a loss as to the weight to be given it.

Ellis vs. State, 65 Miss. 44, 3 So. 188;

Williams vs. State, 72 Miss. 117, 16 So. 296;

Brown vs. State, 142 Miss. 335, 107 So. 373;

Nichols vs. State, 165 Miss. 114, 145 So. 903.

This was the theory of the defendants in this case. When the preliminary inquiry showed the confessions to be voluntary, as pointed out above, they did not show, or offer to show, anything that would indicate them to be otherwise. Later, while testifying on the merits of the case, they testified as to the reasons they had for making the confessions, and instead of calling upon the court to rule upon their competency, they elected to make it an out and out jury question, and procured instructions (No. 2, page 122 of record; and No. 8, page 124 of the record) which told the jury that if it believed their confessions were the result of coercion, force, threats, or intimidation, it should not consider such confessions as evidence against them.

The petitioners have not brought their case within the realm of review of the Mississippi court under these old, well-settled and established rules, and they can com-

plain now only of their own failure to proceed along the orderly lines of procedure marked out by the courts of this state. As pointed out in the decision of the Mississippi Supreme Court in its decision of this case (Record, 172):

> "The rules of procedure here applied are technical only in the sense that all such rules are, and what the appellants request is simply that they be excepted from the procedure heretofore uniformly applied to all litigants. This we cannot do. All litigants, of every race and color, are equal at the bar of this court, and we would feel deeply humiliated if the contrary could be justly said."

The case, both in the trial court and in the State Supreme Court, has been tried according to the rules and regulations that are applied in all cases of its like, and when this has been done, there is nothing of which the prisoners may complain in this court.

As said by this court in the opinion in the case of *In re Converse*, 137 U. S. 624, 631:

> "* * * Appellant has been subjected, as all persons within the State of Michigan are, to the law in its regular course of administration through courts of justice, and it is impossible to hold that a judgment so arrived at is such an unrestrained and arbitrary exercise of power as to be utterly void.

> "We repeat, as has been so often said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of a State."

This last paragraph was also quoted with approval in the case of *Hodgson vs. Vermont*, 168 U. S. 262, 273.

Let us go further, however and suppose that the petitioners had moved to exclude the confessions after their testimony had gone in, and the court had overruled that motion. Let us suppose this was error, and let us likewise suppose that the Supreme Court of Mississippi had affirmed the conviction. What would their rights be then to have this court review their conviction?

In *Jones vs. Buffalo Creek Coal Co.*, 245 U. S. 328, this court said:

> "It is conceivable that the defendants below were right in whole or in part, and that the trial judge erred in admitting some or all of the evidence objected to and in rendering judgment for

the plaintiff. But error of a trial judge in admitting evidence or entering judgment after full hearing does not constitute a denial of due process of law. Central Land Co. vs. Laidley, 159 U. S. 103, 112."

And in *Bonner vs. Gorman,* 213 U. S. 103, it was said:

"It is firmly established that when parties have been fully heard in the regular course of judicial proceedings an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States."—citing Central Land Co. vs. Laidley, 159 U. S. 103, 112.

And, again, in *American Railway Express Co. vs. Kentucky,* 273 U. S. 269, 273, this court held:

"It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. Arrowsmith vs. Harmoning, 181 U. S. 194, 195; Iowa Central Ry. Co. vs. Iowa, 160 U. S. 389, 393; Tracy vs. Ginzberg, 205 U. S. 170, 177; Bonner vs. Gorman, 213 U. S. 86, 91; McDonald vs. Oregon R. R. & Nav. Co., 233 U. S. 665, 669."

In the case of *Barrington vs. Missouri,* 205 U. S. 483, the appellant had been tried and convicted of murder. On

appeal to the State Supreme Court, the judgment was affirmed. A motion for rehearing, asserting Federal questions, was filed and denied without opinion. There was a motion to transfer to the court *en banc* which was sustained and the judgment was again affirmed. Federal questions were set up in this later motion, but the court delivered no opinion thereon. The case was then carried by writ of error to this court. One of the contentions was that alleged extra-judicial admissions had been extorted from him while under arrest and that the use of these admissions in evidence denied him his rights under the Federal constitution, the privilege against self-incrimination. As to the introduction of these admissions of the accused, the court said:

> "When the state offered in evidence the statements made by the defendant following his arrest, the trial court excluded the jury and heard the testimony of persons present at the time for the purpose of determining the competency thereof. After the examination of a number of witnesses, who detailed fully the circumstances under which the statments were made, counsel objected 'because there is no foundation laid for it and because it was (not) voluntary. This objection was overruled and the evidence admitted."

And, in discussing the asserted Federal question, raised for the first time on the motion for rehearing, the court said:

> "The suggestion came too late, and, moreover, Article V of the Amendments, alone relied

on, does not operate as a 'restriction of the powers of a state, but was intended to operate solely upon the Federal Government.' Brown vs. New Jersey, 175 U. S. 172. *And, if, as decided, the admission of this testimony did not violate the rights of the plaintiff in error under the Constitution and Laws of the State of Missouri, the record affords no basis for holding that he was not awarded due process of law.* Howard vs. Fleming, 191 U. S. 126."

The case of *Ensign vs. Pennsylvania*, 227 U. S. 592, involved a prosecution of certain bankers for the statutory crime of receiving deposits in an insolvent bank. At the trial certain schedules filed by them in a bankruptcy proceeding, as well as oral testimony of an expert accountant based upon an examination of their books, was admitted as evidence. The defendants' contentions that such testimony infringed their rights under the Federal Constitution were successively overruled by the state's appellate courts, and an appeal to this court followed. Said the court:

"Article V of Amendments to the Federal Constitution is invoked, which provides (*inter alia*)—'No person * * * shall be compelled in any criminal case to be a witness against himself.' But, as has been often reiterated, this Amendment is not obligatory upon the governments of the several states or their judicial establishments, and regulates the procedures of the Federal Courts only. (—citing cases—)

> "We are referred to a similar prohibition in Art. I, par. 9, of the Constitution of Pennsylvania; *but, even if the trial of the plaintiffs in error proceeded in disregard of this provision, no Federal right was thereby infringed.*"

In the case of *Howard vs. Kentucky*, 200 U. S. 164, this court quoted with approval a part of the opinion in *In re Converse*, 137 U. S. 624, 631, as follows (173):

> "State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction."

Summing up, then, under this phase of the case, the State of Mississippi submits:

> FIRST: There is no Federal constitutional guaranty against compulsory self-incrimination. And since there is no such guaranty under the Federal Constitution, a denial of that right by a state court would infringe no right of an accused under that document, and this court has no jurisdiction to review this judgment upon the asserted ground that the use of extorted confessions amounted to a denial of due process of law;
>
> SECOND: The Mississippi Supreme Court has held, by its decision that the proceedings at the trial of this case in the Circuit Court of Kemper County, Mississippi, infringed no right of the

prisoners under the Mississippi Constitution, and its decision in this respect cannot be reviewed by this Court;

THIRD: The State of Mississippi is free to formulate and regulate its own forms or methods of procedure and practice; it has done so; the petitioners have been tried according to well-settled and established rules and regulations governing trials of criminal cases; there has been no arbitrary action which denies to them any fundamental rights or which conflicts with a single specific provision of the Federal Constitution; and, consequently, "due process of law," as that clause is used in the Fourteenth Amendment, has been accorded them;

FOURTH: If we assume that the trial court erred in its ruling admitting these confessions, such error would not have constituted a denial of due process of law under the Fourteenth Amendment to the Federal Constitution; and,

FIFTH: The State of Mississippi cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even though erroneous, of its highest court, while acting within its jurisdiction.

POINT II.

THAT: PETITIONERS WERE DENIED DUE PROCESS OF LAW THROUGH DENIAL OF COUNSEL.

The record (5) recites that Hon. John A. Clark, DeKalb, Mississippi; Hon. Joe H. Daws, DeKalb, Mississippi; Hon. D. P. Davis, DeKalb, Mississippi; and Hon. L. P. Spinks, DeKalb, Mississippi, appeared for the defendants.

On page 2 of the record now before the court appears the arraignment of the prisoners, which shows that at the time of arraignment they were "represented by legal counsel."

In the cross-examination of Yank Ellington, one of the prisoners, at page 76 of the record, appears the following:

Q. Now, you plead guilty here yesterday?

A. Yes, sir.

Q. You were not any different yesterday from what you are now?

A. Yes, sir.

Q. You had two lawyers appointed for you?

A. Yes, sir.

Q. You came up here this morning and had two more?

A. Yes sir.

In the cross-examination of Ed Brown, another of the prisoners, at page 50 of the record, appears as follows:

Q. The court appointed lawyers for you yesterday afternoon?

A. Yes, sir, but I told him I didn't need none.

Q. You told the Court you didn't think they would do any good?

A. I told him I didn't think they would do no good because the man whipped us and told us we better stand on what we said.

Q. You talked to your lawyers yesterday afternoon?

A. In that room there, yes, sir.

Q. You talked to them again this morning?

A. Yes, sir.

And again at page 54 of the cross-examination of this same prisoner:

Q. The court gave you two lawyers yesterday?

A. Yes, sir.

Q. And two more this morning?

A. Yes, sir.

Q. That makes four?

A. Yes, sir.

Outside of what incidentally appears from the excerpts set out above, the record is silent as to whether counsel who appeared for the prisoners at arraignment and at the trial were employed by them or appointed by the court. It is true that there are some additional mat-

ters set up in what is captioned a "Motion in Arrest of Judgment and for a New Trial," but for reasons hereinafter set out, the State of Mississippi says that this court cannot refer to or be governed by these matters in the decision of this case.

In the opinion of the Mississippi Supreme Court in response to a Suggestion of Error (the equivalent of a Motion for Rehearing) the court said: (R. 172)

> "Much is said in the brief of counsel for the appellants in support of the suggestion of error to the effect that these appellants are negroes and 'stood before the trial court as helpless to defend themselves as sheep in a slaughter pen.' In justice to the court below, *we must say that this charge is not even remotely supported by the record.* It is based probably on things stated in ex parte affidavits in support of the motion in arrest of judgment which have no place in this discussion.
>
> "Again they say that the court below failed 'to provide counsel, in reality to defend' the appellants, and 'surely it is cruel folly for the State to contend, in a court of justice, that these negroes are to be bound by the strictest and most technical rules of practice and pleading—and this after their right to counsel has been effectively denied.' *No request was made of the court to continue the case, to pass it to a later day, or to*

grant the appellants any further time for the preparation of their case.

"The attorneys who defended the appellants in the court below are able lawyers of extensive practice—veterans of many forensic conflicts; and the record does not disclose that they consciously failed to discharge any duty they owed the appellants."

From the part of the court's opinion, quoted above, it will be seen that the court based its decision squarely upon the ground that since the question was not raised in the court below, there was nothing for it to review—in accordance with the rules and regulations referred to in connection with argument on Point 1, supra.

In the leading case of *Spies vs. Illinois,* 123 U. S. 131, 181, this court said:

"* * * To give us jurisdiction under Sec. 709 of the Revised Statutes because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time in the proper way. To be reviewable here the decision must be against the right *so set up or claimed.* (Italics by the court.) *As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that*

the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of counsel for the petitioners, a question of waiver of a right under the Constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned."

The foregoing quotation from the case of *Spies vs. Illinois,* 123 U. S. 131, is quoted with approval by the court in *Jacobi vs. Alabama,* 187 U. S. 133, 136. As sustaining the same proposition, the court cites the cases of *Brooks vs. Missouri,* 124 U. S. 394, and *Baldwin vs. Kansas,* 129 U. S. 52.

In the case of *Baldwin vs. Kansas, supra,* the contention was that the jurors were not sworn according to the form of the oath prescribed by the state statute; that therefore it was not a legal jury; and that the judgment of the court on the verdict of such jury deprived accused of his life without due process of law. In discussing this "Federal" question, the court said:

"* * * In the present case, the record does not show that, at the trial before the jury, any title, right, privilege or immunity was specially set up or claimed. No objection was taken to the form of the oath at the trial, nor at the making of

> the motion for a new trial before the trial court, nor at the making of the motion for arrest of judgment in that court. The point was first suggested in the Supreme Court of the State. *That court, it appears, refused to consider the objection, on the ground that it was not taken at the trial.... For that reason, we, also cannot consider it.*"—citing Spies vs. Illinois, 123 U. S. 131, 181.

As supporting the rule that when and where the highest court of a state declines to pass upon a question upon the ground that it was not presented in the lower court, this court will not review such ruling, see the following additional cases:

Miller vs. Texas, 153 U. S. 535;

Barrington vs. Missouri, 205 U. S. 483;

Corrigan vs. Buckley, 271 U. S. 323;

Brooks vs. Missouri, 124 U. S. 394;

Brown vs. Massachusetts, 144 U. S. 573;

Caldwell vs. Texas, 137 U. S. 692;

McNulty vs. California, 149 U. S. 645.

Under the foregoing decisions of this court, the State of Mississippi submits that since question here under consideration was not raised in the trial court, and the State Supreme Court, the highest court of review in the State, has refused to consider it because of such fact, this court must likewise refuse to review this matter.

The prisoners rely exclusively upon the recent case of *Powell vs. Alabama,* 287 U. S. 45.

Hereinbefore, we have pointed out to the court everything there is in the record properly before the court. Let us see, then, whether, on those instances, there is sufficient to entitle the prisoners to a review of this matter, under what is said in the Powell case, commonly known as the "Scottsboro Case."

Picking up statements of the court in the opinion of the court in that case:

> (49) "But no counsel had been employed, and aside from a statement made by the trial judge several days later during a colloquy immediately preceding the trial, the record does not disclose when, or under what circumstances, an appointment of counsel was made, or who was appointed."

There were three grounds upon which the judgments were assailed, among them, No. 2, the one upon which the court reversed them. The court observed:

> (50) *"These questions were properly raised and saved in the courts below."*

> (53) "It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not

done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. This (said the court) will be amply demonstrated by a brief review of the record."

The court then quotes the trial court as having said:

(53) "The court: I appointed all the members of the bar for the purpose of arraigning the defendants and then of course I anticipated them to continue to help them if no counsel appears."

The foregoing arrangement was the only one which had been made at the time the case was called for trial, and the state had announced ready for trial.

(56) "Whether they (attorneys appointed for the purpose of arraignment) would represent the defendants thereafter if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court."

When Mr. Roddy, an out-of-state lawyer, unfamiliar with the procedure of the Alabama Courts, made his appearance and stated that he wanted to assist whoever the court appointed, it seems that the trial court let it be understood that if he appeared for them, he would make no appointment. Finally, Mr. Moody, a local lawyer, volunteered to assist Mr. Roddy, and, said the court:

(57) "With this *dubious* understanding, the trials immediately proceeded."

(71) "*All that is necessary now to decide, as we do decide* (italics mine) is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

As will be noted above, this court was careful to state that "These questions were properly raised and saved in the courts below." That certainly cannot be said with reference to the case at bar. No "federal question" was ever hinted or raised until after the Supreme Court had decided the case on its merits, and this on a "Suggestion of Error." In its decision, the court did not decide what would have been the result if the matter had been properly raised in the trial court, but denied it upon the sole ground that it was not raised below, and consequently was not subject to review by it. And since it has done so on this one ground, this court cannot now review it.

This court has held that if the state court entertains a motion for rehearing (Suggestion of Error) in which

a Federal question, for the first time in the proceedings, is raised, and proceeds to pass upon the Federal question thus raised, it has been held that the question of Federal right has been raised in time to sustain the appellate jurisdiction of the Federal Court to review the judgment of the state court, although the general rule is that it is too late on a motion for rehearing to inject a Federal question into a case. The view is sustained by the following cases:

McKay vs. Kalyton, 204 U. S. 458;

Sullivan vs. Texas, 207 U. S. 416;

Disconto Gesellschaft vs. Umbrecht, 208 U. S. 570;

Illinois Central R. Co. vs. Kentucky, 218 U. S. 551.;

Kentucky Union Co. vs. Kentucky, 219 U. S. 140;

Grannis vs. Ordean, 234 U. S. 385.

But in this case, the Mississippi Court has not passed upon the Federal question thus raised on the Suggestion of Error, but has declined to consider it because not raised in the trial court, and consequently the general rule must prevail—namely, that the "Federal" question comes too late when first presented on a motion for rehearing, and the state court does not consider it as such.

And in this connection, what was said by this court in *Bonner vs. Gorman* 213 U. S. 86, 91, is important:

> "* * * Where a Federal question is raised on a second appeal and the state court refuses to

consider it, it comes too late. Union Mutual Life Insurance Company vs. Kirchoff, 169 U. S. 103, 110. And see Sayward vs. Denny, 158 U. S. 180; Mut. L. Ins. Co. vs. McGrew, 188 U. S. 291, 308. Moreover, 'according to the well-settled doctrine of this court with regard to cases coming from state courts, *unless a decision upon a Federal question was necessary to the judgment or in fact was made the ground of it, the writ of error must be dismissed.*' Arkansas Southern Railroad Company vs. German National Bank, 207 U. S. 270; California Powder Works vs. Davis, 151 U. S. 389; St. L. I. M. & S. Ry. Co. vs Taylor, 210 U. S. 281."

Also, what was said in *Corrigan vs. Buckley*, 271 U. S. 323, 329, seems to be important in this connection:

"The mere assertion that the case is one involving the construction or application of the Constitution, and in which the construction of federal laws is drawn in question, does not, however, authorize this court to entertain the appeal, and it is our duty to decline jurisdiction if the record does not present such a constitutional or statutory question substantial in character and properly raised below. Sugarman vs. United States, 249 U. S. 182, 184; Zucht vs. King, 260 U. S. 174, 176. And under well settled rules, jurisdiction is wanting if such questions are so unsubstantial as to be plainly without color of

merit and frivolous. Wilson vs. North Carolina, 169 U. S. 586, 595; Delmar Jockey Club vs. Missouri, 210 U. S. 324, 335; Binderup vs. Pathe Exchange, 263 U. S. 291, 305; Moore vs. New York Cotton Exchange, 270 U. S. 593."

And, in *Sugarman vs. United States*, 249 U. S. 182, cited in the Corrigan case, supra:

> "But mere reference to a provision of the Federal Constitution, or the mere assertion of a claim under it, does not authorize this court to review a criminal proceeding; and it is our duty to decline jurisdiction unless the writ of error presents a constitutional question, substantial in character, and properly raised below."—citing some six cases to sustain the ruling.

But aside from all this, counsel who represented these petitioners at the trial made numerous and specific objections throughout the trial, as reflected by the record. The only defense these petitioners could have possibly had was an alibi—and this defense was put forward with completeness by them and by those who might be in a position to know their movements at the time of night this homicide was committed. They made the character of the confessions a jury question, under instructions which they procured the court to give. It is well enough here to observe that in the State of Mississippi, the trial court is denied the right, by statute, to intruct the jury except as it may be requested in writing by one of the parties. Sec.

586, Mississippi Code of 1930. And the State Supreme Court has construed this statute in such a way as that if a trial judge orally instructs the jury, or gives an unrequested instruction, the statute is violated and the adverse party is entitled to a reversal.

Counsel tried this case with the lights before them, so far as this record reveals. They asked for no additional time and from the record it seems that further time was unnecessary, and were satisfied with the whole proceeding until after the Supreme Court affirmed the lower court's judgment. If a tactical mistake or blunder is sufficient to work a denial of due process of law, then the respondent submits that a premium is placed upon trickery, ignorance and inability, and instead of working toward perfection in the profession, the untrained and unskilled licensee would be the rule rather than the exception among the leaders at the bar. We do not believe that this Court will sanction any such rule, but it is our humble belief that this will result if what this record shows is sufficient to work a reversal of this conviction.

The judgment of the Supreme Court of Mississippi affirming the judgment of the Circuit Court of Kemper County, Mississippi, was entered on January 7, 1935. (R. 137). On January 15th, 1935, the appellants filed their motion with the Supreme Court praying for an additional fifteen days within which to file a Suggestion of Error, and this motion was sustained (R. 138). On February 5, 1935, there was filed in the Mississippi Supreme Court a document entitled "Motion in Arrest of Judgment and for

New Trial" (R. 141). Attached to this "Motion" was the ex parte affidavit of John A. Clark, of counsel for appellants in the trial court (R. 146 et seq. and the ex parte affidavits of the three appellants, Yank Ellington, (R. 149), Ed Brown (R. 153), and Henry Shields (R. 157).

The Mississippi Supreme Court, in passing on the Suggestion of Error, refers to this "Motion in Arrest of Judgment and For New Trial" in the following words (R. 172):

> "The appellants have filed what they designate as a motion in arrest of judgment, wherein they set forth matters said to have occurred on the trial which do not appear in the record. *A motion in arrest of judgment will not lie in the supreme court.* It reviews only the rulings of the court below complained of in an assignment of error, and in so doing is confined to an examination of the record made in the court below. It is not a court of original jurisdiction, but of appellate jurisdiction only, and therefore we cannot here examine or consider the allegations in the motion for arrest of judgment, nor the affidavits filed in support thereof."

This observation of the court is in strict conformity with the rules theretofore laid down by it. Not only will a motion in arrest of judgment not lie in the Supreme Court, but its purpose "is to search the record for errors made, not to make another and different record."

State v. Joyner, 148 Miss. 560, 114 So. 340.

The proper way to bring matters before the court which do not appear of record is by special bill of exceptions which is provided by statutes. This is distinctly provided by Sections 588, 589 and 590 of the Mississippi Code of 1930. These sections are discussed in a decision of the Mississippi court, and although at the time of the decision the 1930 code was not in existence, these statutes were brought forward without change from the former codes. The decision just referred to is that of *Fairley v. State*, 152 Miss. 656, 120 So. 747. In that case the court said:

> "The appellant also complains of certain language alleged to have been used by the district attorney in the closing argument to the jury, but this assignment is not properly presented by this record. The record discloses that counsel for the appellant tendered to the trial judge a special bill of exceptions embodying the alleged objectionable language, but the judge refused to sign this bill of exceptions. Counsel for appellant then made and filed an affidavit setting forth his version of the language and the incidents attempted to be incorporated in the special bill of exceptions, and this affidavit and the form of the bill of exceptions that was tendered the trial judge are sent up with the record of this cause.
>
> "Section 796, Code of 1906, (section 594, Hemingway's 1927 Code), provides that bills of

exceptions to any ruling of the court, made before the jury retires from the box, must be tendered and filed during the trial, or during the term of court; while section 798, Code of 1906 (section 600, Hemingway's 1927 Code), provides that, 'if the judge shall refuse to sign a bill of exceptions to an opinion, decision, or charge given or made on the trial of any cause or motion, when the bill of exceptions is tendered to him, it shall be lawful for two attorneys at law who may be present at the time of the giving or making of such opinion, decision, or charge, and of the refusal of the judge to sign such bill of exceptions, to sign the same; and the bill of exceptions so signed shall have the same force and effect as if it had been signed by the judge,' and it has been held that the latter statute provides the only remedy where the judge refuses to sign such a bill of exceptions. The purported special bill of exceptions, therefore, never became a part of the record, and we can only consider matters which are properly a part of the record before us. If, as stated by counsel for appellant, circumstances made it impossible to secure the signature of two attorneys to the bill of exceptions, we are unable to aid him, in the absence of statutory authority so to do."

And along same line and to the same effect, see:

Pittman v. State, 155 Miss. 745, 124 So. 761.

Crane v. State, 157 Miss. 548, 128 So. 529.

Included in the "Motion in Arrest of Judgment" was a motion for a new trial. Such motions lie only in the trial court, and must be made prior to adjournment. They do not lie in the Supreme Court.

Pittman v. State, 147 Miss., 593, 113 So. 348;
Carter v. State, 147 Miss. 171, 113 So. 177;
Carraway v. State, 167 Miss. 390, 148 So. 340.

The filing of this pretended "Motion in Arrest of Judgment and For New Trial" constitutes a palpable and deliberate, though abortive, attempt on the part of counsel to bring, by way of ex parte affidavits, the case within the decision of this court in *Powell v. Alabama*, 297 U. S. 45, supra. It has absolutely no place in Mississippi procedure. The Mississippi Supreme Court refused to consider it because it was not properly a part of the record of the trial, and since that court could not consider it, neither can this court, as expressly held in *Spies v. Illinois*, 123 U. S. 131, 181, where it was held:

> " . . As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more."

In conclusion upon this point, the State of Mississippi sumbits that since this alleged denial of counsel was not

specially set up or claimed in the court below, and the Mississippi Court refused to review this alleged Federal question for the reason that it was not set up or claimed in the trial court, this court can do no more than the State Supreme Court, and decline to review this matter. To give this court jurisdiction, the matter must have been specially set up and claimed in the trial court, and obviously, this has not been done.

POINT III.

THAT: PETITIONERS WERE DENIED DUE PROCESS OF LAW, IN THAT THE TRIAL COURT POSSESSED NO JURISDICTION TO ENTER JUDGMENT.

It is said that by reason of the fraud of state agents, (covered by Point I) and denial of counsel (covered by Point II), the state court was ousted of its jurisdiction and consequently could not enter a valid enforceable judgment.

In other words, did the use of "extorted" confessions and the appointment of counsel, under the circumstances reflected by the record, oust the court of its jurisdiction to enter judgment against these petitioners?

In *Felts v. Murphy*, 201 U. S. 123, the situation confronting the court was as follows: One who was almost totally deaf was tried, convicted and sentenced to life imprisonment in a state court on a charge of murder. On habeas corpus proceedings in a Federal District Court, the validity of the judgment was brought into question, it being insisted that, because of the failure of the trial court to see to it that the prisoner heard and understood the testi-

mony at the trial, the state court was ousted of its jurisdiction and, therefore, its judgment was void. Said the court, in addressing itself to this contention:

(129) "In this case the state court had jurisdiction both of the subject matter and of the person upon the trial of the accused, and such jurisdiction was not lost during his trial but continued to its end, and it had jurisdiction to direct the judgment which was entered and to have the same executed. If there were any irregularities in the trial of appellant, because of the failure of the court to see to it that the testimony in the case was repeated to him through the ear trumpet which he had with him, it was at most an error, which did not take away from the court its jurisdiction over the subject matter and over the person of the accused. The appellant was not deprived of his liberty without due process of law by the manner in which he was tried, so as to violate the provisions of the Fourteenth Amendment to the Federal Constitution. That Amendment, it has been said by this court, 'did not radically change the whole theory of the relations of the state and Federal Governments to each other and of both governments to the people'. In re Kemmler, 136 U. S. 436, 448; Brown v. New Jersey, 175 U. S. 172, 175.

"We are unable to see how jurisdiction was lost in this case by the manner of the trial. The

accused was compos mentis. No claim to the contrary is made. He knew he was being tried, on account of the killing of the deceased. He had counsel and understood the fact that he was on trial on the indictment mentioned, but did not hear the evidence. He made no objection, asked for nothing, and permitted his counsel to take his own course. We see no loss of jurisdiction in all this and no absence of due process of law. It is to be regretted that the testimony was not read or repeated to him. But that omission did not affect the jurisdiction of the court.

. . . and the most that can be urged is that there might have been an error committed by the trial court in omitting to have the evidence repeated to the appellant as it was given by the witnesses at the trial, even though no demand of the kind was made by petitioner or his counsel."

The case of *McMicking v. Shields*, 238 U. S. 99, involved an appeal from a judgment of the Supreme Court of the Philippine Islands, discharging appellee from custody on a judgment entered by the Court of First Instance, at Manila, on a charge of theft, on a writ of habeas corpus. The court stated the facts, in substance, set up in the petition. Among them, it appears that:

(102 "When the case was called at 10 A. M. on December 24th, and while the petitioner was arraigned, he asked for time in which to answer the complaint, which request was denied by the

court, who ordered the clerk to enter on the record that the petitioner pleaded 'Not Guilty' to the complaint. Thereupon the prisoner's attorney also asked for time in which to prepare a defense, which petition was also denied by the same court, to which ruling the petitioner's attorney excepted and asked that the exception, together with the requests of the petitioner which had been denied, be entered on the record."

The Supreme Court of the Philippine Islands held the judgment under which he was held void on the ground that by refusing the requests of him and his counsel, he was denied due process of law and the court was ousted of its jurisdiction to enter judgment against him.

This court, in addressing itself to the conclusion reached by the insular court, said:

"We are unable to agree with the conclusion of the Supreme Court that the judgment pronounced by the Court of First Instance was void and without effect. Under the circumstances disclosed, denial of the request for time to answer and to prepare defense was at most matter of error which did not vitiate the entire proceedings."

The case of *Frank v. Mangum* 237 U. S. 309 (334, 335, 336, 337) likewise holds that a denial of due process of law does not necessarily oust a trial court of its jurisdic-

tion, and that such a denial is an error subject to the corrective processes of the state courts.

In the *Matter of Moran*, 203 U. S. 96, it appears that Moran was tried and convicted in a United States District Court on a charge of murder. He petitioned for writ of habeas corpus and a writ of certiorari in this court. The case was heard on petition and answer. The various grounds upon which the petition was supported were alleged to go to the jurisdiction of the court. Said the court, after disposing of four other grounds:

> (105) "Finally, it is contended that the petitioner was compelled to be a witness against himself, contrary to the Fifth Amendment, because he was compelled to stand up and walk before the jury, and because, during a recess, the jury was stationed so as to observe his size and walk. If this was error, as to which we express no opinion, it did not go to the jurisdiction of the court. Felts v. Murphy, 201 U. S. 123."

Thus it will be seen that an infringement or denial of a constitutional right does not oust the court of its jurisdiction. It is at most a mere error, to be corrected by appeal.

Jurisdiction is the main element inquired into in habeas corpus proceedings. By referring to decisions of this court, it will be seen readily that a denial of due process does not oust a state court of its jurisdiction to enter an

enforceable judgment. As illustrating this proposition, see:

Andrews v. Swartz, 156 U. S. 272;

Markuson v. Boucher, 175 U. S. 184;

Urquhart v. Brown, 205 U. S. 179;

Reid v. Jones, 187 U. S. 153;

Knewel v. Egan, 268 U. S. 442.

If a trial court were ousted of its jurisdiction merely because some ruling might amount to a denial of due process, or a denial of some constitutional right, and its judgment consequently void, an accused could resort to habeas corpus to effect his release. However, it seems that the cases just cited hold that a denial of due process does not avoid a judgment of a trial court, so as to make its judgment reviewable by habeas corpus. Habeas corpus cannot be substituted for a direct review.

And now, while it is our contention that the matters discussed under Points I and II of this brief have not worked a denial of due process of law, nevertheless, if we should concede for the purpose of this argument that either one or both would work such denial, such denial would not have the effect of ousting the court of its jurisdiction to enter judgment in this case. And this is the conclusion pointed to by the decisions set out under this division of the brief.

Upon this proposition, petitioners cite and rely on *In Re Neilsen*, 131 U. S. 176. This case was mentioned by this court in its decision of *Felts v. Murphy*, 201 U. S. 123, 130, and the substance of that decision stated thus:

"The sentence imposed in that case was held by this court to have been beyond the jurisdiction of the trial court to pronounce, because it was against the express provisions of the Constitution, which bounds and limits all jurisdiction".

Obviously, this case can have no application to the point presented here. No complaint is made that the trial court or the supreme court of Mississippi had no jurisdiction either as to the person or as to the crime. The sentence imposed did not exceed the limits fixed by law, and no complaint is made on this ground. The only thing insisted is that there has been a denial of due process of law and consequent loss of jurisdiction; but, obviously, under the decisions of this court, jurisdiction can not be lost on such denial.

POINT IV.

THAT: PETITIONERS WERE DENIED DUE PROCESS OF LAW, IN THAT THEY WERE DENIED EQUAL PROTECTION OF THE LAW.

This assignment of error is based upon the theory that the petitioners were denied the right to make a motion for a new trial in the Circuit Court of Kemper County, Mississippi. In the brief of petitioners it is said that they filed a Motion for a New Trial and in Arrest of Judgment in the Supreme Court of Mississippi, on the theory that no opportunity had been afforded for filing same in the lower court. And they said, further: "Had the opportunity been afforded, and had counsel appointed by the court tak-

en advantage thereof, the technicality on which the Supreme Court relied in affirming the case, on original appeal, would *probably* have been swept away."

In *Duncan v. Missouri*, 152 U. S. 377, 382, it was said that equal protection of the law is afforded when

> ". . . the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of the government."

and in *Leeper v. Texas*, 139 U. S. 462, 468, this court said:

> ". . . that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied."

In *In Re Converse*, 137 U. S. 624, 631, it was said by this court:

> "We repeat, as has been so often said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudica-

tions of the courts of a State in administering the process provided by the law of a State."

In *Allen v. Georgia*, 166 U. S. 138, 140, the court said:

". . . Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process."

In *Frank v. Mangum*, 237 U. S. 309, 326, it was said:

"As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense",—citing several cases supporting the rule.

So far as the "Motion in Arrest of Judgment and for New Trial" together with the affidavits attached thereto

are concerned, this court, as pointed out under Point II hereof, cannot consider such matters. No motion for a new trial was filed in the trial court, nor is there anything in the record to indicate that court adjourned even in the face of a request for time within which to file such a motion for new trial.

Under Mississippi procedure, a motion for new trial must be filed in the trial court. This is necessarily so because the Supreme Court is a court of review, while a motion for new trial, particularly the matters referred to in the "Motion in Arrest of Judgment and for New Trial", involve issues of fact where proof would be necessary. Under our procedure a motion is at issue without any formal pleading.

Young v. State, 150 Miss. 787, 117 So. 119;

Reed v. State, 143 Miss. 686, 109 So. 715.

And the averments of a motion are not proof thereof, and the burden is on the movant to establish them.

Tatum v. State, 171 Miss. 336, 157 So. 892.

In *Pittman v. State*, 147 Miss. 593, 113 So. 348, the Mississippi Court held, with reference to the action of a trial judge on a motion for new trial after the term at which a judgment was entered had expired:

> "When the term of court was finally adjourned, the appellant's right to file a motion for a new trial ended, and any action of the trial

judge in reference to such a motion, which was filed after the adjournment of the term, was of no effect, and is not properly a part of this record."

The court further said, in this same case:

"The verdict in this case was returned into court in the presence of able associate counsel for the appellant, and the record does not show that counsel requested any delay in order to enable them to present a motion for a new trial or in any way indicated to the court that they desired to present any such motion, and this being true, the appellant cannot now complain that the court adjourned the term when it had completed all business before it."

Along the same line is the case of *Carter v. State*, 147 Miss. 171, 113 So. 177, where the record did not show that any oral proof was offered to substantiate any of the grounds set up in the motion for new trial.

As part and parcel of this motion for new trial which was filed in the Mississippi Supreme Court was the motion in arrest of judgment, which, as herein before pointed out, will likewise not lie in that court.

In disposing of this "Motion in Arrest of Judgment and for New Trial" filed in the Supreme Court, these petitioners have been treated exactly the same as all others similarly situated, and in accordance with the well estab-

lished modes of procedure legislatively and judicially declared. And under the decisions of this court which are set out at the beginning of the discussion under this Point IV, the State of Mississippi submits that in so doing it has not denied to them the equal protection of the laws of the state, and that this court should now say, as it did in *In Re Converse*, 137 U. S. 624, 631:

> " . . . . Appellant has been subjected, as all persons within the State of Michigan are, to the law in its regular course of adminstration through courts of justice, and it is impossible to hold that a judgment so arrived at is such an unrestrained and arbitrary exercise of power as to be utterly void."

POINT V.

THAT: THE DECISION OF THE SUPREME COURT OF MISSISSIPPI IS, ITSELF, A DENIAL OF DUE PROCESS OF LAW.

Upon this point, the petitioners base their argument upon the proposition that the Mississippi Court, by holding that they had "waived" their right to object to these "extorted" confessions, denied them due process of law; and it is argued that they could not waive their "fundamental rights."

Before going any further into this discussion it is well enough to determine this question of "waiver". In the case of *Spies v. Illinois*, 123 U. S. 131, 181, it was said,

in connection with an argument on the use of a letter which it was claimed was illegally obtained and used in the prosecution:

> "Even if the court was wrong in saying that it did not appear that the Most letter was one of the papers illegally seized, it still remains uncontradicted that objection was not made in the trial court to its admission on that account. To give us jurisdiction under Sec. 709 of the Revised Statutes because of the denial by a State court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time in the proper way. To be reviewable here the decision must be against the right so set up or claimed. As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. *This is not, as seems to be supposed by one of counsel for the petitioners, a question of a waiver of a right under the Constitution, laws or treaties of United States, but a question of claim.* If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is

concerned. The question whether the letter, if obtained in the manner alleged, would have been competent evidence is not before us, and, therefore no foundation is laid under this objection for the exercise of our jurisdiction."

In other words, under the decision in the *Spies* case, supra, the "doctrine of waiver", referred to by counsel, has no application to the case at bar. It was not strictly a waiver, but *a failure to claim.* Under the Federal Constitution, one has the right to remain silent and refuse to testify if he so desires. If he goes upon the witness stand and does testify, however, he is not, under the decision referred to, said to have "waived" his right, but has merely failed to "claim" such right. Certain evidence may be said, as a matter of law, to be incompetent; the party against whom it is sought to be used has the privilege of objecting to it; but for one reason or another he has no objection to it, and fails to make objection to it. In this instance, the "doctrine of waiver" has no application to his decision, but it is a mere "failure to claim". And if he fails to "claim" his right to object to evidence, he has no right to allege in a court of review that the trial court erred in allowing such evidence to go to the jury. It seems to the writer that instead of the "doctrine of waiver" being involved, it is strictly the "doctrine of election", and one should be held to his election in a court of review. This is the rule in Mississippi, as pointed out in connection with the argument on Point I.

In disposing of this matter, the Mississippi Supreme Court has travelled the well established and clearly defined

pathway of appellate court procedure, and has invoked no unusual or arbitrary rule applicable to none others but these. Under the decisions of this court, from the beginning down to the present time, due process and equal protection of the law has been accorded them.

On this point, petitioners quote from *Hopt v. Utah*, 110 U. S. 574, 579. This case has been discussed in later decisions of this court, so that, while it held that a defendant could not "waive" his right to be present at his trial and every part of it, it has been expressly limited. For instance, in the case of *Frank v. Mangum*, 237 U. S. 309, this court said:

> ". . . In Hopt v. Utah, 110 U. S. 574, 578, (principally relied on), the court had under review a conviction in a territorial court after a trial subject to the local code of criminal procedure, which declared: If 'the indictment is for a felony, the defendant *must be* (italics by the court) personally present at the trial.' The judgment was reversed because of the action of the trial court in permitting certain challenges to jurors, based upon the ground of bias, to be tried out of the presence of the court, the defendant, and his counsel. The ground of the decision of this court was the violation of the plain mandate of the local statute; and the power of the accused or his counsel to dispense with the requirements as to his personal presence was denied on the ground that his life could not be lawfully taken

except in the mode prescribed by law. No other question was involved. See Diaz v. United States, 223 U. S. 442, 455, 458."

This limitation of the court of the Hopt case, supra, was recognized in the case of *Snyder v. Massachusetts*, 291 U. S. 97, 106, and approved.

Under this division of the brief for petitioners as well as under Point 1, this whole proceeding is assumed to be thoroughly impregnated and tainted with fraud, and they invoke the principle laid down in *Mooney v. Holohan*, (U. S.) 79 Law Ed. 347, to the effect that

> ". . . . if a state has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through *a deliberate deception of court and jury by the presentation of testimony known to be perjured.*"

the requirement of due process of law, as provided by the Fourteenth Amendment, is not satisfied.

The Mississippi Court, in passing upon this contention (R. 170), said:

> "Mooney v. Holohan, L. ed. Adv. Opinion, Vol. 79, p. 347, is cited and relied on by the appellants but its relevancy here is not apparent. There the charge was that Mooney was convicted on perjury evidence, known to be such by the prosecuting officer, who suppressed evidence, un-

known to Mooney, in impeachment thereof. No charge either of perjury or the suppression of evidence is here made. On the contrary, all of the facts as to the confessions being coerced were known to the appellants when they were offered and were provable by their own personal testimony."

To assume that there was fraud in this case is to do violence to all the rules of law relating to "fraud". Since fraud vitiates everything it enters into, it is never assumed or presumed, but the showing of fraud must be clear and convincing. To presume fraud here, we would further have to presume that the prosecuting attorney was a party to a "deliberate deception of court and jury", and certainly there is nothing upon which this charge may be based.

This court judicially knows that where confessions are used in evidence at trials, there is hardly any exception to the rule that evidence to show the involuntary character of them is brought to the attention of the court. The books are in complete accord upon the proposition that the competency of confessions is a matter for the trial court to pass upon. And if a prosecuting attorney is to be faced with the dangerous necessity of offering only an air-tight voluntary confession or be guilty of consummating a legal fraud, then we say that the rule just stated, that the trial judge passes first upon the competency of confessions, has been thrown to the winds.

There is no hint of perjury in the record before this court. To the contrary these appellants admit that they

said just exactly what the state witnesses say they did. No testimony was concealed from them. They knew better than anyone else, perhaps, just exactly what did happen, and they admit that the true circumstances are before the court. We are not here dealing with three innocent men, but three guilty ones, as clearly appears from their own cross-examinations. Not only this, but on the very day of the trial, two of them voluntarily called the Sheriff of the County aside and told him that they had told him the truth when they were in the Lauderdale County jail. Where is there any fraud? any deliberate deception?

And in determining this question, let the Court keep in mind that force and intimidation was not resorted to to secure the confessions which were used at the trial. Counsel for petitioners leaves the impression in his brief that the confessions which were used were the direct result of beatings administered by those who testified with reference to the confessions, but the record does not bear him out on that ground. He further assumes that the wrongful influence used in obtaining the initial confessions still obtained when the later confessions were given. The petitioners' own testimony on cross-examination negatives any charge of force, threats, intimidation and the like, and not only shows that there was no abuse, ill-treatment or other form of coercion indulged in at that time, but on the other hand they say that they were kindly treated at this latter interview. Their only explanation is that they were "scared", and their version of the circumstances surrounding this latter interview with Sheriff Adcock shows that they were not "scared", but, that as they told the Sheriff

at the time of the trial, they told him the truth about what happened on the night of this brutal murder.

CONCLUSION.

So far as the use of the confessions in this case is concerned, respondent says that there is no right, privilege or immunity guaranteed under the Federal Constitution against self-incrimination which is infringed by the use of extorted (assuming that these confessions were extorted) confessions in the trial of a criminal case in a state court. We have shown where the Mississippi Supreme Court has affirmed this conviction by following the well-established rules of procedure, and that no unusual or arbitrary procedure has been resorted to in so doing:

That, so far as the alleged denial of counsel is concerned, that matter has been settled by the decision of the Mississippi Supreme Court upon the ground that no complaint thereof was registered before or during the trial; that there was nothing to review; and consequently there is nothing for this court to review;

That the Circuit Court of Kemper County, Mississippi, had jurisdiction of both the person and the offense in this case and nothing it did or failed to do ousted it of its jurisdiction; and the Mississippi Supreme Court likewise was never ousted of its jurisdiction to enter a valid judgment;

That the case, from beginning to end, has been tried under the usual rules of procedure and practice, and, as said by the Mississippi Supreme Court (R. 172):

> "The rules of procedure here applied are technical only in the sense that all such rules are, and what the appellants request is simply that they be excepted from the procedure heretofore uniformly applied to all litigants."

That there has been no denial of due process of law within the meaning of that phrase as used in the Federal Constitution, and no denial or infringement of any other right guaranteed by that Constitution; and that an affirmance of this judgment would be proper under the previous pronouncements of this court.

Respectfully submitted,

GREEK L. RICE, Attorney General

WILLIAM DOW CONN, JR., and

WILLIAM H. MAYNARD, Assistant Attorneys General.

Counsel for Respondent.

CERTIFICATE

I, William Dow Conn, Jr., Assistant Attorney General of the State of Mississippi, of counsel for respondent, hereby certify that I have this day served opposing counsel with copies of this brief.

This the ..... day of January, 1936.

.....

APPENDIX

MISSISSIPPI CONSTITUTION.

Sec. 26. In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself; but in prosecutions for rape, adultery, fornication, sodomy or the crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial.

Sec. 146. The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals.

MISSISSIPPI STATUTES REFERRED TO IN BRIEF

Sections Taken from the Mississippi Code of 1930.

Sec. 588—On the trial of prosecutions for any crime or misdemeanor, it shall be the duty of the judge to sign any bill of exceptions tendered by the defendant during the progress thereof, if the truth of the case be fairly stated therein, and the said exceptions shall be a part of the record of such prosecution.

Sec. 589—Bills of exceptions to any ruling of the court, made before the jury retires from the box, must be tendered and signed during the trial, or during the term of the court, and bills of exceptions to judgments overruling motions for new trials must be presented to the judge for his signature during the term or within ten days, or such further time, not exceeding sixty days, as the court may allow, after the end of the term, and must be signed promptly by him if found to be correct; and if the death, resignation or other incapacity of the judge shall prevent him from signing a bill of exceptions, the affidavit of the attorney of record who represented the party tendering the bill of exceptions, and all of them if more than one, that it correctly states the facts and rulings of the court, shall be received as a substitute for the signature of the judge to it; but in such case, if the appellee shall file in the Supreme Court an affidavit of himself or his attorney in the court below, that the bill of exceptions is not correct, stating particularly wherein it is not correct, he may file any affidavits than his own touching the matter, and the opposite party may do likewise up to the time of the call of the case for trial in the Supreme Court; and said court shall consider and determine, on submission of the case, both as to the truth of the bill of exceptions and the questions involved in what the court may determine to be the bill of exceptions.

Sec. 590—If the judge shall refuse to sign a bill of exceptions to an opinion, decision, or change given or made on the trial of any cause or motion, when the bill of exceptions is tendered to him, it shall be lawful for two attorneys

at law who may be present at the time of the giving or making of such opinion, decision, or charge, and of the refusal of the judge to sign such bill of exceptions, to sign the same; and the bill of exceptions so signed shall have the same force and effect as if it had been signed by the judge.

Sec. 586—INSTRUCTIONS.—The judge in any cause, civil or criminal, shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement. The clerk, before they are read or given to the jury, shall mark all instructions asked by either party, or given by the court, as being "given" or "refused", as the case may be, and all instructions so marked shall be a part of the record, on appeal, without a bill of exceptions.

Sec. 1293—Sentence upon Conviction—in capital cases, power of the jury.—In any case in which the penalty prescribed by law upon the conviction of the accused is death, except in cases otherwise provided, the jury finding a verdict of guilty may fix the punishment at imprisonment for the natural life of the party; and thereupon the court shall

sentence him accordingly; but if the jury shall not thus prescribe the punishment, the court shall sentence the party found guilty to suffer death, unless the jury by its verdict certify that it was unable to agree upon the punishment, in which case the court shall sentence the accused to imprisonment in the penitentiary for life.

SUPREME COURT OF THE UNITED STATES.

No. 301.—October Term, 1935.

Ed Brown, Henry Shields, and Yank Ellington, Petitioners, *vs.* State of Mississippi. } On Writ of Certiorari to the Supreme Court of the State of Mississippi.

[February 17, 1936.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The question in this case is whether convictions, which rest solely upon confessions shown to have been extorted by officers of the State by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States.

Petitioners were indicted for the murder of one Raymond Stewart, whose death occurred on March 30, 1934. They were indicted on April 4, 1934, and were then arraigned and pleaded not guilty. Counsel were appointed by the court to defend them. Trial was begun the next morning and was concluded on the following day, when they were found guilty and sentenced to death.

Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury. After a preliminary inquiry, testimony as to the confessions was received over the objection of defendants' counsel. Defendants then testified that the confessions were false and had been procured by physical torture. The case went to the jury with instructions, upon the request of defendants' counsel, that if the jury had reasonable doubt as to the confessions having resulted from coercion, and that they were not true, they were not to be considered as evidence. On their appeal to the Supreme Court of the State, defendants assigned as error the inadmissibility of the confessions. The judgment was affirmed. 158 So. 339.

Defendants then moved in the Supreme Court of the State to arrest the judgment and for a new trial on the ground that all the evidence against them was obtained by coercion and brutality known to the court and to the district attorney, and that de-

fendants had been denied the benefit of counsel or opportunity to confer with counsel in a reasonable manner. The motion was supported by affidavits. At about the same time, defendants filed in the Supreme Court a "suggestion of error" explicitly challenging the proceedings of the trial, in the use of the confessions and with respect to the alleged denial of representation by counsel, as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States. The state court entertained the suggestion of error, considered the federal question, and decided it against defendants' contentions. 161 So. 465. Two judges dissented. *Id.*, p. 470. We granted a writ of certiorari. 296 U. S. —.

The grounds of the decision were (1) that immunity from self-incrimination is not essential to due process of law, and (2) that the failure of the trial court to exclude the confessions after the introduction of evidence showing their incompetency, in the absence of a request for such exclusion, did not deprive the defendants of life or liberty without due process of law; and that even if the trial court had erroneously overruled a motion to exclude the confessions, the ruling would have been mere error reversible on appeal, but not a violation of constitutional right. *Id.*, p. 468.

The opinion of the state court did not set forth the evidence as to the circumstances in which the confessions were procured. That the evidence established that they were procured by coercion was not questioned. The state court said: "After the state closed its case on the merits, the appellants, for the first time, introduced evidence from which it appears that the confessions were not made voluntarily but were coerced". *Id.*, p. 466. There is no dispute as to the facts upon this point and as they are clearly and adequately stated in the dissenting opinion of Judge Griffith (with whom Judge Anderson concurred)—showing both the extreme brutality of the measures to extort the confessions and the participation of the state authorities—we quote this part of his opinion in full, as follows (*Id.*, pp. 470, 471):

"The crime with which these defendants, all ignorant negroes, are charged was discovered about one o'clock p. m. on Friday, March 30, 1934. On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who

began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the State of Alabama; and while on the way, in that State, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.

"The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. On Sunday night, April 1, 1934, the same deputy, accompanied by a number of white men, one of whom was also an officer, and by the jailer, came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers. When the confessions had been obtained in the exact form and contents as desired by the mob, they left with the parting admonition and warning that, if the defendants changed their story at any time in any respect from that last stated, the perpetrators of the outrage would administer the same or equally effective treatment.

"Further details of the brutal treatment to which these helpless prisoners were subjected need not be pursued. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account, than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.

"All this having been accomplished, on the next day, that is on Monday, April 2, when the defendants had been given time to

recuperate somewhat from the tortures to which they had been subjected, the two sheriffs, one of the county where the crime was committed, and the other of the county of the jail in which the prisoners were confined, came to the jail, accompanied by eight other persons, some of them deputies, there to hear the free and voluntary confession of these miserable and abject defendants. The sheriff of the county of the crime admitted that he had heard of the whipping, but averred that he had no personal knowledge of it. He admitted that one of the defendants, when brought before him to confess, was limping and did not sit down, and that this particular defendant then and there stated that he had been strapped so severely that he could not sit down, and as already stated, the signs of the rope on the neck of another of the defendants were plainly visible to all. Nevertheless the solemn farce of hearing the free and voluntary confessions was gone through with, and these two sheriffs and one other person then present were the three witnesses used in court to establish the so-called confessions, which were received by the court and admitted in evidence over the objections of the defendants duly entered of record as each of the said three witnesses delivered their alleged testimony. There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment, under every rule of procedure that has heretofore been prescribed, and hence it was not necessary subsequently to renew the objections by motion or otherwise.

"The spurious confessions having been obtained—and the farce last mentioned having been gone through with on Monday, April 2d—the court, then in session, on the following day, Tuesday, April 3, 1934, ordered the grand jury to reassemble on the succeeding day, April 4, 1934, at nine o'clock, and on the morning of the day last mentioned the grand jury returned an indictment against the defendants for murder. Late that afternoon the defendants were brought from the jail in the adjoining county and arraigned, when one or more of them offered to plead guilty, which the court declined to accept, and, upon inquiry whether they had or desired counsel they stated that they had none, and did not suppose that counsel could be of any assistance to them. The court thereupon appointed counsel, and set the case for trial for the following morning at nine o'clock, and the defendants were returned to the jail in the adjoining county about thirty miles away.

"The defendants were brought to the courthouse of the county on the following morning, April 5th, and the so-called trial was opened, and was concluded on the next day, April 6, 1934, and resulted in a pretended conviction with death sentences. The evi-

dence upon which the conviction was obtained was the so-called confessions. Without this evidence a peremptory instruction to find for the defendants would have been inescapable. The defendants were put on the stand, and by their testimony the facts and the details thereof as to the manner by which the confessions were extorted from them were fully developed, and it is further disclosed by the record that the same deputy, Dial, under whose guiding hand and active participation the tortures to coerce the confessions were administered, was actively in the performance of the supposed duties of a court deputy in the courthouse and in the presence of the prisoners during what is denominated, in complimentary terms, the trial of these defendants. This deputy was put on the stand by the state in rebuttal, and admitted the whippings. It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, 'Not too much for a negro; not as much as I would have done if it were left to me'. Two others who had participated in these whippings were introduced and admitted it—not a single witness was introduced who denied it. The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the trial, including the state's prosecuting attorney and the trial judge presiding".

1. The State stresses the statement in *Twining* v. *New Jersey*, 211 U. S. 78, 114, that "exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution", and the statement in *Snyder* v. *Massachusetts*, 291 U. S. 97, 105, that "the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the State". But the question of the right of the State to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter.

The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts, supra; Rogers* v. *Peck*, 199 U. S. 425, 434. The State may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information.

Walker v. *Sauvinet*, 92 U. S. 90; *Hurtado* v. *California*, 110 U. S. 516; *Snyder* v. *Massachusetts, supra.* But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. *Moore* v. *Dempsey*, 261 U. S. 86, 91. The State may not deny to the accused the aid of counsel. *Powell* v. *Alabama*, 287 U. S. 45. Nor may a State, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is "but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured". *Mooney* v. *Holohan*, 294 U. S. 103, 112. And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions". *Hebert* v. *Louisiana*, 272 U. S. 312, 316. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

2. It is in this view that the further contention of the State must be considered. That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. *Moore* v. *Dempsey, supra.* We

are not concerned with a mere question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient. In an earlier case the Supreme Court of the State had recognized the duty of the court to supply corrective process where due process of law had been denied. In *Fisher* v. *State*, 145 Miss. 116, 134, the court said: "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them in trials against them has been the curse of all countries. It was the chief iniquity, the crowning infamy, of the Star Chamber, and the Inquisition and other similar institutions. The constitution recognized the evils that lay behind these practices and prohibited them in this country. . . . The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective".

In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. *Mooney* v. *Holohan*, *supra*. It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right fully established and specially set up and claimed and the judgment must be reversed.

It is so ordered.